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The Reports

OF

SIR EDWARD COKE, KNT.

VOL. IV.

J. AND T. CLARKE, ST. JOHN'S SQUARE, LONDON.

The Reports

OF

SIR EDWARD COKE, KNT.

IN THIRTEEN PARTS.

A NEW EDITION,

WITH ADDITIONAL NOTES AND REFERENCES,
AND WITH ABSTRACTS OF THE PRINCIPAL POINTS:

THE FIRST THREE PARTS AND THE FOURTH TO VOL. 38 a.

By JOHN HENRY THOMAS, Esq.

THE REST OF THE FOURTH AND THE REMAINING NINE PARTS

By JOHN FARQUHAR FRASER, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

IN SIX VOLUMES.

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1826.



THE
SEVENTH PART
OF THE
REPORTS
OF

SIR EDWARD COKE, KNT.

LORD CHIEF JUSTICE OF THE COMMON PLEAS.

OF DIVERS RESOLUTIONS AND JUDGMENTS GIVEN UPON SOLEMN ARGUMENTS,
AND WITH GREAT DELIBERATION AND CONFERENCE
OF THE REVEREND JUDGES AND SAGES OF THE LAW, OF CASES IN LAW
WHICH WERE NEVER RESOLVED OR ADJUDGED BEFORE :
AND THE REASONS AND CAUSES OF THE SAID RESOLUTIONS AND JUDGMENTS.

PUBLISHED IN

THE SIXTH YEAR OF THE MOST HIGH AND MOST ILLUSTRIOUS

JAMES,

KING OF ENGLAND, FRANCE, AND IRELAND, AND OF SCOTLAND THE XLII.

THE FOUNTAIN OF ALL PIETY AND JUSTICE, AND THE LIFE OF THE LAW.

*Frequentibus argumentis et collationibus latens veritas aperitur, cum sub eisdem verbis sæpe
lateat multiplex intellectus.*

Veritas sæpius agitata magis splendescit in lucem.

WITH NOTES AND REFERENCES,
By JOHN FARQUHAR FRASER, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

DEO, PATRIÆ, TIBI.

SEXTÆ Commentariorum sive Relationum mearum parti vix extremam manum addideram (lector candide) cum, quæ singulos exercuit Angliæ Judices, oborta est controversia, cujus certè similis nunquam fuit ante hunc diem in aula West. agitata: unde etiam, dum eorum quæ audieram recens admodum memoria fuit, ea præcipue (prout mos semperque apud me fuit) quæ summarie ex omnibus disputationibus atque argumentis, plurimum ponderis ac momenti, sive autoritates sive rationes ad solvendam quæstionem annotassem, in proprium solamen meum et juvamen (infida enim est labilisque memoria) privatim literis mandavi. Nunquam autem ista quovismodo in publicum proditura putavi, quia (quod primum arbitror et præcipuum quod ex relationibus edendis per-

I HAD no sooner (good Reader) made an end of the Sixth Part of my Commentaries or Reports, but the greatest case that ever was argued in the hall of Westminster began to come in question, and afterwards was argued by all the Judges of England. This great case (for that memory is *infida et labilis*) while the matter was recent and fresh in mind, and almost yet sounding in the ear, I set down in writing, out of my short observations which I had taken of the effect of every argument (as my manner is, and ever hath been,) a summary memorial of the principal authorities and reasons of the resolutions of that case, for my own private solace and instruction. I never thought to have published the same, for that it was not like to give any direction in like cases that

might happen, (the chief-est end of publishing Reports,) it is of its own nature so like the phoenix, and so singular and rare in accident, as the union of two famous and ancient kingdoms in ligeance and obedience under one great and mighty monarch. Now when I had ended it for my private use, I was by commandment to begin again (a matter of no small labour and difficulty) for the public. For certainly, that succinct method and collection that will serve for the private memorial or repertory, especially of him that knew and heard all, will nothing become a public report for the present and all posterity, or be sufficient to instruct those Readers, who of themselves know nothing, but must be instructed by the report only in the right rule and reason of the case in question. And as *unda gignit undam*, so commonly one labour cometh not alone. This brought on another with it: for seeing this case was of so rare a quality, I thought good as well for thine instruction and use (good Reader) as for the repose and quiet of many in resolving of questions and doubts (wherein there hath been great diversity of opinions) con-

1.

cipi potest emolumentum;) non verisimile est hunc casum de aliis in judicando cognitionem informaturum: nam duo nobilissima simul et antiquissima regna in unam constari monarchiam, uno in utrisque florentissimo rege invictissimoque monarcha dominante, hoc usu infrequens, imo sicut ipse phoenix unicum et individuum est in specie, cum quo comparari potest socium habens neminem. Tum demum cum tantum, quantum mei solius causa apud memet annotare volui, perfectissem, mandatum mihi fuit, ut de novo (quod non minimi sudoris erat et difficultatis) in usum etiam publicum recolligerem: nam certe succincta ista et compendiosa annotandi methodus, quæ satis est in memoriam colligentis, qui omnia atque singula prout gesta fuerunt audierit et cognoverit, nequaquam sane satis erit in eo scribendi genere, quod et in præsens et futurum seculum est duraturum, et quod lectores etiam, qui per semetipsos nihil habent præter illud quod ex eo quod conscriptum est addiscant, est edocturum. Et sicut unda gignit undam, sic labor unus alium tanquam gemellum aliquem videtur esse consecutum: nam cum

hic quem dixi casus, novus esset et inauditus, animum idcirco induxi non inutilem fore, si cum et temet (candide lector) in quantum possem erudirem, aliis item in ambiguarum quarundam, de terris et tenementis suis (in quibus adhuc graves admodum et inter se pugnantes jurisperitorum opiniones extiterunt) quæstionum solutione satisfacerem, alios nonnullos casus usu frequentiores, et dignitate inter cæteros nequaquam minores, nunquam antehac dilucide satis judiciis explicatos, in medium proferrem: ita ut jam ratum sit quod jamdudum apud antiquos in proverbium abiit, *Labor labori laborem addit*.

Putavi ego, ex mea in concives meos charitate, cujuscunque demum conditionis religionisve sint, navandam esse operam, ut non solum hanc septimam Relationum mearum partem (cui colligendæ ac in lucem edendæ Deus in hisce temporum angustiis, dum in gravioribus reipublicæ negotiis versatus sum, vires dedit) omnibus ob oculos ponerem, sed ut eosdem etiam adhortarer et præmonerem in quodam non mediocri momenti casu, qui singulos ita necessario eoque modo spectat,

cerning their estates and possessions, to publish some other that are common in accident, weighty in consequent, and yet never resolved or adjudged before: so as it is now verified in this, that which hath been said of old, *Labor labori laborem addit*.

With this Seventh Work or Part of my Reports (whereunto Almighty God of his goodness hath in this short time, amongst many other public employments, enabled me) I have out of my love unto all my dear conntrymen, of what persuasion in religion soever they be, thought good to give them all a caveat or forewarning in a case of great importance, that deeply and dangerously concerns them all in so high a point, that in the first degree it is a *Præmunire*, and in the second high

treason. And yet many men, without all fear (by reason I think they know not the law) run into the danger thereof almost every day. I must confess, that this is a writing or scribbling world. *Quotidie plures, quotidie pejus scribunt.* And sure I am, that no man can either bring over those books of late written (which I have seen) from Rome or Romanists, or read them, and justify them, or deliver them over to any other with a liking and allowance of the same, (as the Author's end and desire is they should,) but they run into desperate dangers and downfalls; for the first offence is a *Præmunire*, which is to be adjudged to be out of the King's protection, to lose all their lands and goods, and to suffer perpetual imprisonment; and they, that offend the second time therein, incur the heavy danger of high treason. These books have glorious and goodly titles, which promise directions for the conscience, and remedies for the soul. But there is *mors in olla*: they are like to apothecaries' boxes, *quorum tituli pollicentur remedia, sed pixides ipsæ venena continent*, whose titles promise remedies, but the boxes themselves contain poi-

ut, si quid in eo peccatum fuerit, in primo gradu sit pœna de Præmunire, in secundo læsæ majestatis culpa, in quo tamen multi (dum legem, ut mihi videtur, ignorant) temere et inconsulto pene quotidie delinquant. Mihi certe confitendum est, eo usque nunc temporis redactum esse hoc seculum, ut quisque pro se sedulo in describendis libellulis faciat, viz Quotidie plures, quotidie pejus scribunt. Et certo certius est si quisquam hominum libros istos (quos ego vidi) nuperrime conscriptos a Roma vel a Romanistis ad nos usque attulerit, aut eos legendo suffragiis patrocinatoris fuerit, aut eos item aliis approbando (quod maxime apud authores in votis est) legendos dederit, in summas, et turbulentissimas periculorum tempestates incidat necessum est: nam primo cum in hunc modum peccarit pœnas dabit per Præmunire (quæ sic se habent, adjudicari non esse in Regis protectione; eorum terras et bona omnia in Regis potestatem redigi; et corpora carceri perpetuo damnari): et qui secundo deliquerit læsæ majestatis grave supplicium incurret. Hi sunt illi libri qui splendidos et imprimis re-

ligiosos præ se ferunt titulos ; hi illi sunt qui conscientiis hominum infirmitate laborantibus opem ferre se profitentur ; hi sunt illi denique qui miseræ et miserandas peccatrices animas in optatum tranquillitatis et salutis portum adducere in se suscipiunt ; at mors in olla ; quemadmodum plerumque in pharmacopolarum vasculis videre est, quorum tituli pollicentur remedia, sed pixides ipsæ venena continent. Hisce ego præmonitionibus usus sum e sollicita eorum cura, qui præstigias et imposturas istas (quibus hi, quos tanto prosequuntur amore et reverentia, in summum capitis periculum eos de improviso ducant) nondum cognorunt. Jam vero, neque culices, qui quasi titillando pungunt paulo, non penetrant, neque fucos istos qui susurris tantis bombulisque quos edunt maximis, aculeis autem, quibus carent ægrius, nusquam loci belligerare solent, tantillum pertimesco ; imo inquam, ut est apud poetam.

son. This forewarning I give out of conscience and care of their safety, that blindfold might fall into so great danger by their means whom they so much reverence. I am not afraid of gnats that can prick and cannot hurt, nor of drones that keep a buzzing, and would, but cannot sting.

Non metuo pulicis stimulos, fucique susurros.

Nec pili quidem æstimo
invidum istum et maledi-

And little do I esteem an
uncharitable and malicious

practice in publishing of an erroneous and ill-spelled pamphlet, under the name Pricket, and dedicating it to my singular good Lord and father-in-law, the Earl of Exeter, as a charge given at the assizes holden at the city of Norwich, 4 August, 1606, which I protest was not only published without my privity, but (besides the omission of divers principal matters) that there is no one period therein expressed in that sort and sense that I delivered it: wherein it is worthy of observation, how their expectation (of scandalizing me) was wholly deceived; for behold the catastrophe! Such of the Readers as were learned in the laws, finding not only gross errors and absurdities on law, but palpable mistakings in the very words of art, and the whole context of that rude and ragged style, wholly dissonant (the subject being legal) from a lawyer's dialect, concluded that *inimicus et iniquus homo superseminavit zizania in medio tritici*: the other discreet and indifferent readers, out of sense and reason, found out the same conclusion, both in respect of the vanity of the phrase, and for that I, publishing about the same time one of my Commentaries, would,

cum, qui, quo fusius venena sua evomeret, libellum quendam, nescio an rudem an inconcinnum magis, sub titulo et nomine Pricket in lucem protulit, dicatum optimo meo domino et Socero Comiti Excestr. et inscriptum, Memoriale sive mandatum juratorum in assisis apud civitatem Nordovicam, 4 die Augusti, 1606, quem sane contestor non solum me omnino insciente fuisse divulgatum, sed (omissis etiam ipsis potissimis) ne unum quidem sententiolam eo sensu et significatione, prout dicta erat, fuisse enarratam. Jam vero si catastrophen expectes, ecce (dum perpetuum in me dedecus et infamiam inurere conatus est) quam falsum ejus eum habuit expectatio? Primo enim lectores illi, juris peritos dico, qui inter legendum, non solum graves et turpes errores et devias opinionum absurditates, sed ipsas etiam voces artis turpiter in alienum sensum usurpatas, et totum denique contextum longissime a juris consultorum (de legibus enim agebatur) usu et consuetudine remotissimum esse, animadvertunt, continuo hoc in ore habuerunt, *Inimicus et iniquus homo superseminavit zizania in medio tritici*. Deinde alii quoque cordati

et æqui lectores, dum generis dicendi et phrasis levitatem serio perpenderunt, suapte sponte in eandem inciderunt opinionem: nam, cum eodem fere tempore Commentarium quendam ipse divulgarem, pro certo statuerunt, si ea animus fuisset divulgandi, memetipsum voluisse, meo proprio nomino nequaquam nomine Pricket, mea propria opera omnibus inspicienda præbuisse: idcirco quasi una voce conclamaverunt omnes, illud ipsum opus tum natura sua maxime nequam esse et pudendum, cum ab opifice scelerato et mendaci proficiscatur:

if I had intended the publication of any such matter, have done it myself, and not to have suffered any of my works pass under the name of Pricket; and so *unâ voce conclamaverunt omnes*, that it was a shameful and shameless practice, and the author thereof, to be a wicked and malicious falsary.

Circumvertit enim vis et injuria quemque,
Atque unde exorta est in eum plerunque revertit.

In hisce, sicut in aliis meis Relationibus, hoc mihi præcipue curæ fuit, ut (quantum me penes erat) obscuritatem, ambiguitatem, periclitationem, novitatem et prolixitatem aversarer. 1. Obscuritatem, quæ sane haud absimilis tenebrarum est, in quibus misere solis radiis viduos necesse est huc illuc, ultro citroque, usquequaque deviare. 2. Ambiguitatem, in qua non ut supra lucis inopia laboramus, sed variis meatuum anfractibus, et irremeabilibus dubitationum

In these and the rest of my Reports, I have (as much as I could) avoided obscurity, ambiguity, jeopardy, novelty, and prolixity. 1. Obscurity, for that is like unto darkness, wherein a man for want of light can hardly with all his industry discern any way. 2. Ambiguity, where there is light enough, but there be so many winding and intricate ways, as a man for want of direction shall be much perplexed and entangled to find out the right way. 3. Jeopardy, either

in publishing of any thing, that might rather stir up suits and controversies in this troublesome world, than establish quietness and repose between man and man, (for a commentary should not be like unto the winterly sun, that raiseth up greater and thicker mists and fogs than it is able to disperse,) or in bringing the reader, by any means, into the least question of peril or danger at all. 4. Novelty; for I have ever holden all new or private interpretations, or opinions, which have no ground or warrant out of the reason or rule of our books, or former precedents, to be dangerous, and not worthy of any observation; for *periculosum existimo quod bonorum virorum non comprobatur exemplo*. 5. Prolixity; for a Report ought to be no longer than the matter requireth; and as *Languor prolixus gravat medicum, ita Relatio prolixa gravat lectorem*.

mæandris ita distracti sumus, ut quid sequendum, quid fugiendum sit, prorsus ignoremus. 3. Periclitationem, ne quicquam omnino in medium proferrem, quod quæstiones magis novas et controversias ad turbandum, quam tranquillitatem et concordiam ad stabilendum hunc fluctuantem hominum statum procreet, (non enim convenit, ut hujusmodi commentarii illud agant quod plerumque solent hyberni soles, qui densiores nebulas et fuliginosiores concitant, quam quas eisdem radiorum viribus dispergere valent,) aut quod lectorem meum vel in primaria erroris et dubitationis limina quoque modo ducat. 4. Novitatem, eo quod id maxime laborandum arbitror, ut novas quascunque interpretationunculas et privatas opiniones, (quæ, si ad amussim nostrorum librorum et antiquorum exempla applicentur, nequaquam quadrant) periculosissimas, et studiis nostris indignissimas existimo quod bonorum virorum non comprobatur exemplo. 5. Prolixitatem, cum in Relationibus hoc imprimis sit optandum, ut sint adeo compendiario breves prout necessitas resque ipsa ferre potest; sicut enim languor prolixus

gravat medicum, ita Relatio proluxa gravat lectorem.

Quod casus ille de Postnatis reliquis est prolixior, confitendum est, at vero tres, quæ fusiorem me fecerunt in eo renuntiando, causæ graviores accesserunt. 1. Quod in Camera Scaccarii casus erat discussus, ad quem quidem discutiendum omnes Angliæ Judices (quemadmodum leges et consuetudines postulant) sigillatim, aperte, et copiose sunt argumentati. 2. Quia non alius fuit uspiam casus in Camera Scaccarii quoad quispiam nunc temporis virorum cogitatione potest assequi, quem tot insimul Judices, tamque elaborate pertractarunt: non enim Dominus Cancellarius solum, sed alii etiam quatuordecim Judices in eodem casu vires suas et ingenia limate exercuerunt. 3. Quia tanta fuit varietas atque copia tam materiæ rationum et argumentorum ponderibus libratæ, quam formæ multis excellentium ingeniorum, mirabiliumque artium ornamentis decoratæ, ut breviter et succincte magis referri non posse videbatur.

Nunc demum, hoc ulterius tantum votis amplector meis; primum ut studiosus lector quantam ego quidem

The case of Postnati, I confess, is longer than any of the rest, and that for three causes: first, for that it was an Exchequer-chamber case, for deciding whereof all the Judges of England (as the law doth require) did argue openly, and at large. Secondly, for that never any case within man's memory, was argued by so many Judges in the Exchequer chamber, as this was, there having argued the Lord Chancellor and fourteen Judges. Thirdly, for the variety as well of the important matter, as of the several kinds of excellent learning and knowledge, delivered in the arguments of this case.

Finally, with these wishes and desires I conclude, first, that the studious reader might indeed receive as

great profit and delight in reading this Work, as I did (unless mine own judgment deceive me) in composing and framing thereof. Secondly, that *quoad ejus fieri possit, quamplurima legibus ipsis definiantur, quam paucissima vero Judicis arbitrio relinquantur.*

(si non meum me deluserit judicium) in componendis et formandis, tantam ille itidem revera in legendis hisce Relationibus utilitatem simul et voluptatem excerpit ; deinde ut quoad ejus fieri possit, quamplurima legibus ipsis definiantur, quam paucissima vero Judicis arbitrio relinquantur.

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* POSTNATI (A).

CALVIN'S CASE.

Trin. 6 Jac. 1.

JAMES by the grace of God of England, Scotland, France, and Ireland, King, Defender of the Faith, &c. To the Sheriff of Middlesex greeting: Robert Calvin, gent. hath complained to us, that Richard Smith and Nicholas Smith, unjustly, and without judgment, have disseised him of his freehold in Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard, in Shoreditch, within thirty years now last past; and therefore we command you, that if the said Robert shall secure you to prosecute his claim, then that you cause the said tenement to be rescised with the chattels which within it were taken, and the said tenement with the chattels to be in peace until Thursday next after fifteen days of Saint Martin next coming; and, in the mean time, cause twelve free and lawful men of that neighbourhood to view the said tenement, and the names of them to be inbreviated; and summon them by good summoners, that they be then before us wherever we shall then be in England, ready thereof to make recognition; and put, by sureties and safe pledges, the aforesaid Richard and Nicholas, or their bailiffs, (if they cannot be found), that they be then there, to hear the recognition; and have there the summoners, the names of the pledges, and this writ. Witness ourself at Westminster, the 3d day of November, in the 5th year of our reign of England, France, and Ireland, and of Scotland the one-and-fortieth.

* Moor 790.
Vide Dyer fo.
304. 2 Jon. 10.
Vaugh. 286.
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Case of the
Dutchy. Elles-
mer, Postnati,
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periority 304.
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Allegiance.
The writ of As-
sise.

For 40s. paid in the hamper,

KINDESLEY.

(A) Vid. *Doe v. Acklam*, 2 Barn. and Cress. 779. S. C. 4 Dow. and Ryl. 394, that children born in the United States of America, since the recognition of their inde-

pendence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands in this country.

[* 1 b.]
The Count.

Alienage plead-
ed in bar.

Demurrer.

Joinder.

Continuances.

THE assize cometh to recognise, if Richard *Middlesex, ss.* Smith, and Nicholas Smith unjustly, and without judgment, did disseise Rob. Calvin, gent. of his freehold in *Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard in Shoreditch, within thirty years now last past: and whereupon the said Robert, who is within the age of twenty-one years, by John Parkinson, and William Parkinson, his guardians, by the Court of the said King here to this being jointly and severally specially admitted, complaineth, that they disseised him of one messuage with the appurtenances, &c. And the said Richard and Nicholas, by William Edwards, their attorney, come and say, that the said Robert ought not to be answered to his writ aforesaid, because they say, that the said Robert is an alien born, on the 5th day of Nov. in the 3rd year of the reign of the King that now is, of England, France, and Ireland, and of Scotland the thirty-ninth, at Edinburgh within his kingdom of Scotland aforesaid, and within the allegiance of the said lord the King, of the said kingdom of Scotland, and out of the allegiance of the said lord the King of his kingdom of England; and at the time of the birth of the said Robert Calvin, and long before, and continually afterwards, the aforesaid kingdom of Scotland, by the proper rights, laws, and statutes of the same kingdom, and not by the rights, laws, or statutes of this kingdom of England, was and yet is ruled and governed. And this he is ready to verify, and thereupon prayeth judgment, if the said Robert, to his said writ aforesaid, ought to be answered, &c. And the aforesaid Robert Calvin saith, that the aforesaid plea, by the aforesaid Richard and Nicholas above pleaded, is insufficient in law to bar him the said Robert from having an answer to his writ aforesaid; and that the said Robert to the said plea in manner and form aforesaid pleaded, needeth not, nor by the law of the land is bound to answer; and this he is ready to verify, and hereof prayeth judgment; and that the said Richard and Nicholas to the aforesaid writ of the said Robert may answer. And the said Richard and Nicholas, forasmuch as they have above alleged sufficient matter in law to bar him the said Robert from having an answer to his said writ, which they are ready to verify; which matter the aforesaid Robert doth not gainsay, nor to the same doth in any ways answer, but the said averment altogether refuseth to admit as before pray judgment, if the aforesaid Robert ought to be answered to his said writ, &c. And because the Court of the Lord the King here are not yet advised of giving their judgment of and upon the premises, day thereof is given to the parties aforesaid; before the Lord the King at Westminster until Monday next after eight days of St. Hilary, to hear their judgment thereof, because the Court of the Lord the King here thereof are not yet, &c. And the assize aforesaid remains to be taken before the said Lord the King, until the same Monday there, &c. And the Sheriff to distrain the recognitors of the assize aforesaid: and in the *interim* to cause a view, &c.; at which day, before the Lord the King at Westminster,

come as well the aforesaid Robert Calvin, by his guardians aforesaid, as the aforesaid Richard Smith and Nicholas Smith by their attorney aforesaid; and because the Court of the Lord the King *here of giving their judgment of and upon the premises is not yet advised, day thereof is given to the parties aforesaid before the Lord the King at Westminster, until Monday next after the morrow of the Ascension of our Lord, to hear their judgment; because the Court of the Lord the King here are not yet, &c. And the assize aforesaid remains further to be taken, until the same Monday there, &c.; and the Sheriff, as before, to distrain the recognitors of the assize aforesaid, and in the *interim* to cause a view, &c. At which day, before the Lord the King at Westminster, come as well the aforesaid Robert Calvin by his guardians aforesaid, as the the aforesaid Richard Smith and Nicholas Smith, by their attorney aforesaid, &c.; and because the Court of the Lord the King here, &c.

*Curia adesse
vult.*

[* 2 a.]

THE CASE.

A man born in Scotland after the accession of King James the first to the English throne, and during his reign, may hold lands in England. S. C. Howel's State Trials, Vol. II. p. 559.

THE question of this case as to matter in law was, whether Robert Calvin the plaintiff (being born in Scotland since the crown of England descended to his Majesty) be an alien born, and consequently disabled to bring any real or personal (*a*) action for any lands within the realm of England. After this case had been argued in the Court of King's Bench, at the bar, by the counsel learned of either party, the judges of that Court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the law) into the (*b*) Exchequer chamber, to be argued openly there; first by the counsel learned of either party, and then by all the Judges of England; where afterwards the case was argued by Bacon, Solicitor-General, on the part of the plaintiff, and by Laur. Hyde for the defendant; and afterward by Hobart, Attorney-General, for the plaintiff, and by Serjeant Hutton for the defendant; and, in Easter term last, the case was argued by Heron, puisne Baron of the Exchequer, and Foster, puisne Judge of the Court of Common Pleas; and, on the second day appointed for this case, by Crook, puisne Judge of the King's Bench, and Altham, Baron of the Exchequer; the third day by Snigge, Baron of the Exchequer, and Williams, one of the Judges of the King's Bench; the fourth day by Daniel, one of the Judges of the Court of Common Pleas, and by Yelverton, one of the Judges of the King's Bench: and, in

CALVIN
v.
SMITH
and
Another.

(a) 1 Bulstr.
134. Yelv.
198. Owen 45.
Co. Lit. 129 b.
1 And. 25.
Moor 431.
1 Keb. 266.
Cr. El. 142.
683. Cro. Car.
9. 4 Inst. 152.
How this case
hath proceeded.
2 (b) Bulst. 146

[* 2 b.]

The arguments
and objections
on the part of
the defendant.

Trinity term following, by Warburton, one of the Judges of the Common Pleas, and Fenner, one of the Judges of the King's Bench: and after by Walmesley, one of the Judges of the Common Pleas, and Tanfield, Chief Baron; and, at two several days in the same term, Coke, Chief Justice of the Common Pleas, Fleming, Chief Justice of the King's Bench, and Sir Thomas Egerton, Lord Ellesmere, Lord Chancellor of England, argued the case (the like plea in disability * of Robert Calvin's person being pleaded *mutatis mutandis* in the Chancery in a suit there for evidence concerning lands of inheritance; and, by the Lord Chancellor, adjourned also into the Exchequer-chamber, to the end that one rule might overrule both the said cases.) And first (for that I intend to make as summary a report as I can) I will at the first set down such arguments and objections as were made and drawn out of this short record against the plaintiff by those that argued for the defendants. It was observed, that in this plea there were four nouns, *quatuor nomina*, which were called *nomina operativa*, because from them all the said arguments and objections on the part of the defendants were drawn; that is to say—
1. *Ligeantia* (which is twice repeated in the plea; for it is said, *infra ligeantiam domini Regis regni sui Scot'*, *et extra ligeantiam domini Regis regni sui Angl'*.) 2. *Regnum* (which also appeareth to be twice mentioned, viz. *regnum Angl'*, and *regnum Scot'*.) 3. *Leges* (which are twice alleged, viz. *leges Angl'*, and *leges Scot'*, two several and distinct laws.) 4. *Alienigena* (which is the conclusion of all, viz. that Robert Calvin is *alienigena*.)

1. *Ligeantia*. By the first it appeareth, that the defendants do make two ligeances, one of England, and another of Scotland; and from these several ligeances two arguments were framed, which briefly may be concluded thus: Whosoever is born *infra ligeantiam*, within the ligeance of King James of his kingdom of Scotland, is *alienigena*, an alien born, as to the kingdom of England: but Robert Calvin was born at Edinburgh, within the ligeance of the King of his kingdom of Scotland; therefore Robert Calvin is *alienigena*, an alien born, as to the kingdom of England. 2. Whosoever is born *extra ligeantiam*, out of the ligeance of King James of his kingdom of England, is an alien as to the kingdom of England: but the plaintiff was born out of the ligeance of the King of his kingdom of England; therefore the plaintiff is an alien, &c. Both these arguments are drawn from the very words of the plea, viz. *quod præd' Robertus est alienigena, natus 5 Nov. anno regni domini Regis nunc Angl' &c. tertio apud Edinburgh infra regnum Scot' ac infra ligeantiam dicti domini Regis dicti regni sui Scot'*, *ac extra ligeantiam dicti domini Regis regni sui Angl'*.

2. *Regna*. From the several kingdoms, viz. *regnum Angl'* and *regnum Scot'* three arguments were drawn. 1. *Quando (a) duo jura (imo duo regna) concurrunt in una persona, æquum est ac si essent in diversis*: but in the King's per-

(a) Ellesmere's
Postnati 88.
Post. 14 b. 4
Co. 118 a. Cawly 209. Moor 793. 804.

son there concur two distinct and several kingdoms; therefore it is all one as if they were in divers persons, *and consequently the plaintiff is an alien, as all the *antenati* are, for that they were born under the ligeance of another King 2. Whatsoever is due to the King's several politic capacities of the several kingdoms is several and divided: but ligeance of each nation is due to the King's several politic capacities of the several kingdoms; *ergo*, the ligeance of each nation is several and divided, and consequently the plaintiff is an alien, for that they that are born under several ligeances are aliens one to another. 3. Where the King hath several kingdoms by several titles and descents, there also are the ligeances several: but the King hath these two kingdoms by several titles and descents; therefore the ligeances are several. These three arguments are collected also from the words of the plea before remembered. [* 3 a.]

3. *Leges*. From the several and distinct laws of either kingdom, they did reason thus: 1. Every subject that is born out of the extent and reach of the laws of England, cannot by judgment of those laws be a natural subject to the King, in respect of his kingdom of England: but the plaintiff was born at Edinburgh, out of the extent and reach of the laws of England; therefore the plaintiff by the judgment of the laws of England cannot be a natural subject to the King, as of his kingdom of England. 2. That subject, that is not at the time and in the place of his birth inheritable to the laws of England, cannot be inheritable or partaker of the benefits and privileges given by the laws of England: but the plaintiff at the time, and in the place of his birth was not inheritable to the laws of England, (but only to the laws of Scotland;) therefore he is not inheritable or to be partaker of the benefits or privileges of the laws of England. 3. Whatsoever appeareth to be out of the jurisdiction of the laws of England, cannot be tried by the same laws: but the plaintiff's birth at Edinburgh is out of the jurisdiction of the laws of England; therefore the same cannot be tried by the laws of England. Which three arguments were drawn from these words of the plea, *viz. Quodque tempore natiuitatis præd' Roberti Calvin, ac diu antea, et continuè postea, præd' regnum Scot' per jura, leges, et statuta ejusdem regni propria, et non per jura, leges, seu statuta hujus regni Angl' regulat' et gubernat' fuit, et adhuc est.*

4. *Alienigena*. From this word *alienigena* they argued thus: every subject that is *alien' gentis* (*i. e.*) *alien' ligeant'*, *est alienigena*: but such a one is the plaintiff; therefore, &c. And to these nine arguments all that was spoken learnedly and at large by those that argued against the plaintiff may be reduced.

*But it was resolved by the Lord Chancellor and twelve Judges, *viz.* the two Chief Justices, the Chief Baron, Justice Fenner, Warberton, Yelverton, Daniel, Williams, Baron Snigge, Baron Altham, Justice Crooke, and Baron Heron, that the plaintiff was no alien, and consequently that he ought to be answered in this assise by the defendants. [* 3 b.]

How this case was argued by the Ld. Chancellor and the Judges.

This case was as elaborately, substantially, and judicially argued by the Lord Chancellor, and by my brethren the Judges, as I ever read or heard of any; and so in mine opinion the weight and consequence of the cause, both *in presenti et perpetuis futuris temporibus* justly deserved: for though it was one of the shortest and least that ever we argued in this court, yet was it the longest and weightiest that ever was argued in any court, the shortest in syllables, and the longest in substance; the least for the value (and yet not tending to the right of that least) but the weightiest for the consequent, both for the present, and for all posterity. And therefore it was said, that those that had written *de fossilibus* did observe, that gold hidden in the bowels of the earth, was in respect of the mass of the whole earth, *parvum in magno*; but of this short plea it might be truly said (which is more strange) that here was *magnum in parvo*. And in the arguments of those that argued for the plaintiff, I specially noted, that albeit they spake according to their own heart, yet they spake not out of their own head and invention: wherein they followed the counsel given in God's book, *interroga pristinam generationem* (for out of the old fields must come the new corn) *et diligenter investiga patrum memoriam*, and diligently search out the judgments of our forefathers, and that for divers reasons: first on our own part, *Hesterni enim sumus et ignoramus, et vita nostra sicut umbra super terram*; for we are but of yesterday. (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure, neminem oportet esse sapientiozem legibus*: no man ought to *take upon him to be wiser than the laws. Secondly, in respect of our forefathers: *ipsi* (saith the text) *docebunt te, et loquentur tibi, et ex corde suo proferent eloquia*, they shall teach thee, and tell thee, and shall utter the words of their heart, without all equivocation or mental reservation; they (I say) that cannot be daunted with fear of any power above them, nor be dazzled with the applause of the popular about them, nor fretted with any discontentment (the matter of opposition and contradiction) within them, but shall speak the words of their heart, without all affection or infection whatsoever.

Also in their arguments of this cause concerning an alien, they told no strange histories, cited no foreign laws, produced no alien precedents, and that for two causes; the one, for that the laws of England are so copious in this point, as, God willing, by the report of this case shall appear; the other, lest their arguments concerning an alien born should become foreign,

b 8. 8.

Co. Lit. 97 b.
*[4 a.]

strange, and an alien to the state of the question, which being *questio juris* concerning freehold and inheritance in England, is only to be decided by the laws of this realm. And albeit I concurred with those that adjudged the plaintiff to be no alien, yet do I find a mere stranger in this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for *judex est lex loquens*) the Judges our forefathers of the law never tasted: I say, such a one, as the stomach of the law, our exquisite and perfect records of pleadings, entries, and judgments, (that make equal and true distribution of all cases in question) never digested. In a word, this little plea is a great stranger to the laws of England, as shall manifestly appear by the resolution of this case. And now that I have taken upon me to make a report of their arguments, I ought to do the same as truly, fully, and sincerely as possibly I can. Howbeit, seeing that almost every Judge had in the course of his argument a peculiar method, and I must only hold myself to one, I shall give no just offence to any, if I challenge that which of right is due to every reporter, that is, to reduce the sum and effect of all to such a method, as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment and resolution of the case in question.

The method that the reporter doth use.

In this case five things did fall into consideration. 1. *Ligeantia*. 2. *Leges*. 3. *Regna*. 4. *Alienigena*. 5. What legal inconveniences would ensue on either side.

What things did fall into consideration in this case.

[* 4 b.]

*1. Concerning ligeance: 1. It was resolved what ligeance was: 2. How many kinds of ligeances there were: 3. Where ligeance was due: 4. To whom it was due: and last, how it was due.

2. For the laws: 1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England: 3. That the law of nature was before any judicial or municipal law in the world: 4. That the law of nature is immutable, and cannot be changed.

3. As touching the kingdoms, how far forth by the act of law the Union is already made, and wherein the kingdoms do yet remain separate and divided.

4. Of *alienigena*, an alien born: 1. What an alien born is in law: 2. The division and diversity of aliens: 3. Incidents to every alien: 4. Authorities in law: 5. Demonstrative conclusions upon the premises, that the plaintiff can be no alien.

5. Upon due consideration had of the consequent of this case: what inconveniences legal should follow on either party.

And these several parts, I will, in this report, pursue in such order as they have been propounded; and, first, de *ligeantia*.

The 1st general part, what ligeance is.

(a) Bacon's Discourse of Laws and Government. 2d Part, fo. 46, 47, &c. Co. Lit. 129 a. Grotius, lib. 2. fol. 160.

1. (a) Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign. *Ligeantia est vinculum fidei*; and *ligeantia est quasi legis essentia*. *Ligeantia est ligamentum, quasi ligatio mentium: quia sicut ligamentum est connexioa rticularum et juncturarum, &c.* As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects, *quasi uno ligamine*. Glanville, who wrote in the reign of H. 2. lib. 9. cap. 4. speaking of the connexion which ought to be between the lord and tenant that holdeth by homage saith, that *mutua debet esse domini et fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam*, and the lord (saith he) ought to defend his tenant. But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects, **regere et protegere subditos*: so as between the Sovereign and subject there is *duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: meritò igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen*. And therefore it is holden in 20 H. 7. 8. a. that there is a liege or ligeance between the King and the subject. And Fortescue, cap. 13. *Rex (b) ad tutelam legis corporum et bonorum subditorum erectus est*. And in the acts of Parliament of 10 R. 2. cap. 5. and 11 R. 2. cap. 1. 14 H. 8. cap. 2. &c., subjects are called liege people; and in the acts of Parliament in 34 H. 8. cap. 1. and 35 H. 8. cap. 3., &c. the King is called the liege lord of his subjects. And with this agreeth M. Skeene in his book *De Expositione Verborum*, (which book was cited by one of the Judges which argued against the plaintiff) ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them. Whereby it appeareth, that in this point the law of England and of Scotland is all one. Therefore it is truly said that *protectio trahit subjectionem, et subjectio protectionem*. And hereby it plainly appeareth, that ligeance doth not begin by the oath in the leet; for many men owe true ligeance that never were sworn in a leet, and the swearing in a leet maketh no (c) denization, as the book is adjudged in 14 H. 4. fol. 19. b. This word ligeance is well expressed by divers several names or *synonyma* which we find in our books. Sometimes it is called the obedience or obeisance of the subject to the King, *obedientia Regi*, 9. E. 4. 7. b. 9. E. 4. 6. (d) 2 R. 3. 2. a. in the Book of Entries, *Ejectione firm'* 7. 14 H. 8. cap. 2. 22 H. 8. cap. 8., &c. Sometimes he is called a natural liege man that is born under the power of the King, *sub potestate Regis*, 4 H. 3. (c) tit. Dower. *Vide* the statute of 11 E. 3. c. 2. Sometimes li-

[* 5 a.]

Note.

(b) Cro. Arg. 64.

(c) Br. Deniz. 11. Postea 15. b.

(d) Br. Deniz. 8.

(e) 4 Hen. 3. Fitz. Dow. 179. Ellesmere's Postnati 13, 14. Jenk. Cent. 3.

geance is called faith, *fides*, *ad fidem Regis*, &c. Bracton, who wrote in the reign of H. 3. lib. 5. tractat' de exception', cap. 24. fol. 427. *Est etiam alia exceptio quæ competit ex personâ quærentis, propter defectum nationis, ut si quis alienigena qui fuit ad fidem Regis Franc', &c.* And Fleta (which book was made in the reign of E. 1.) agreeth therewith; for l. 6. c. 47. *de except' ex omissione participis*, it is said, *vel dicere potuit, quod nihil juris clamare poterit tanquam particeps eo quod est ad fidem Regis Franciæ, quia alienigenæ repelli debent in Angl' ab agendo, donec fuerunt ad fidem Reg' Angl'.* Vide 25 E. 3. *de natis ultra mare*, faith and ligeance of the King of England; and Litt. lib. 2. cap. Homage, (a) saving the faith that I owe to our Sovereign Lord the King, and Glanv. l. 9. c. 1. *Salva fide debitu dom' Regi et hæredibus suis.* Sometimes ligeance is *called ligealty, 22 Ass. pl. 25. By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens. So, as seeing now it doth appear what ligeance is, it followeth in order, that we speak of the several kinds of ligeance. But herein we need to be very wary, for this caveat the law giveth, *ubi lex non distinguit nec nos distinguere debemus*; and certainly *lex non distinguit*, but where *omnia membra dividentia* are to be found out and proved by the law itself.

(a) Lit. sect. 85.
Co. Lit. 64 b.

[* 5 b.]

2. There is found in the law four kinds of ligeances; the first is, *ligeantia naturalis, absoluta, pura, et indefinita*, and this originally is due by nature and birth-right, and is called *alta ligeantia*, and he that oweth this is called *subditus natus*. The second is called *ligeantia acquisita*, not by nature but by acquisition or denization, being called a denizen, or rather donaizon, because he is *subditus datus*. The third is, *ligeantia localis*, wrought by the law; and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other. The fourth is a legal obedience, or ligeance which is called legal, because the municipal laws of this realm have prescribed the order and form of it; and this to be done upon oath at the torn of the leet. The first, that is, ligeance natural, &c. appeareth by the said acts of parliament, wherein the King is called natural liege lord, and his people natural liege subjects; this also doth appear in the indictments of treason (which of all other things are the most curiously and certainly indicted and penned) for in the indictment of the Lord Dacre, in 26 H. 8. it is said, *præd' Dominus Dacre debitum fidei et ligant' suæ, quod præfato domino Regi naturaliter et de jure impendere debuit, minime curans*, &c. And Reginald Pool was indicted in 30 H. 8. for committing treason *contra dom' Regem supremum et naturalem dominum suum*. And to this end were cited the indictment of Edward Duke of Somerset in 5 E. 6. and many others both of ancient and later times. But in the indictment of treason of John Dethick in

How many
kinds of li-
geances there
be.

Co. Lit. 129 a.

*Ligeantia na-
turalis.*
Co. Lit. 129 a.

2 and 3 Phil. and Mar. it is said, *quod præd' Johannes machinans, &c. prædict' dominum Philippum et dominam Mariam supremos dominos suos*, and omitted (*naturalis*) because King Philip was not his natural liege lord. And of this point more shall be said when we speak of local obedience. The second is *ligeant' acquisita*, or denization; and this in the books and records of the law appeareth to be three-fold: 1. Absolute, as the common denizations be, to them and their *heirs, without any limitation or restraint: 2. Limited, as when the King doth grant letters of denization to an alien, and to the heirs (a) males of his body, as it appeareth in 9 E. 4. fol. 7, 8. in Baggot's case: or to an alien for term of his life, as was granted to J. Reynel, 11 H. 6. 3. It may be granted upon (b) condition, for (c) *cujus est dare, ejus est disponere*, whereof I have seen divers precedents. And this denization of an alien may be effected three manner of ways; by parliament, as it was in 3 H. 6. 55. in Dower: by letters patent, as the usual manner is; and by conquest, as if the King and his subjects should conquer another kingdom or dominion, as well *antenati* as *postnati*, as well they which fought in the field, as they which remained at home, for defence of their country, or employed elsewhere, are all denizens of the kingdom or dominion conquered. Of which point more shall be said hereafter.

3. Concerning the local obedience it is observable, that as there is a local protection on the King's part, so there is a (d) local ligeance of the subject's part. And this appeareth in 4 Mar. Br. 32. (c) and 3 and 4 Phil. and Mar. Dyer 144. Sherley a Frenchman, being in amity with the King, came into England, and joined with divers subjects of this realm in treason against the King and Queen, and the indictment concluded (f) *contra ligeant' suæ debitum*; for he owed to the King local obedience, that is, so long as he was within the King's protection; which local obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is (g) a natural born subject; *a fortiori* he that is born under the natural and absolute ligeance of the King (which, as it hath been said, is *alta ligeantia*) as the plaintiff in the case in question was, ought to be a natural born subject; for *localis ligeantia est ligeantia infima et minima, et maxime incerta*. And it is to be observed, that it is *nec cælum, nec solum*, neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born; for if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject to the King of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King. And concerning this local obedience, a precedent was cited in Hilar. 36 Eliz. when Stephano Ferrara de Gama, and Emanuel Lewis Tinoco, two Portuguese born, coming into England under Queen Elizabeth's safe conduct, and living here under her protection, joined with Doctor Lopez in treason within *this realm against her Majesty; and in this case two points were resolved by the

Ligeantia acquisita.
Co. Lit. 129 a.
[* 6 a.]

(a) 9 E. 4. 8.

(b) Co. Lit.
129 a. 274 b.
(c) 2 Co. 7 b.
4 Inst. 192.
2 Siderf. 73.
Hard. 412.
Lit. Rep. 128.
1 And. 115.
Salk. 411, 412.
4 Mod. 215.
222. Vaugh.
405. Dav. 36.

Ligeantia localis.
(d) Co. Lit.
129 a.
(e) B. N. C. 487.

(f) Hob. 271.
Co. Lit. 129 a.
Dyer 145, pl.
62.
Cawly 184.
3 Inst. 11.
(g) Co. Lit. 8 a.
5 Eliz. Dyer
224 a. b.

1 H. P. C. 59.

[* 6 b.]

Judges. First, that their indictment ought to begin, that they intended treason *contra dominam Reginam*. &c. omitting these words (*naturalem domin' suam*) and ought to conclude *contra (a) ligeant' suæ debitum*. But if an (b) alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason (B); for the indictment cannot conclude *contra ligeant' suæ debitum*, for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law. And so it was in anno 15 H. 7. in Perkin Warbeck's case, who being an alien born in Flanders, feigned himself to be one of the sons of Edward the Fourth, and invaded this realm with great power, with an intent to take upon him the dignity royal: but being taken in the war, it was resolved by the Justices, that he could not be punished by the common law, but before the Constable and Marshal (who had special commission under the great seal to hear and determine the same according to martial law) he had sentence to be drawn, hanged, and quartered, which was executed accordingly. And this appeareth in the book of Griffith Attorney-General, by an extract out of the book of Hobart, Attorney-General to King H. 7.

4. Now are we to speak of legal ligeance, which in our books viz. 7 E. 2. tit. Avowry 211. 4 E. 3. fol. 42. 13 E. 3. tit. Avowry 120, &c. is called suit royal, because that the ligeance of the subject is only due unto the King. This oath of ligeance appeareth in Britton, who wrote in anno 5 E. 1. cap. 29. (and is yet commonly in use to this day in every leet) and in our books; the effect whereof is: "You shall swear, that from this day forward, you shall be true and faithful to our Sovereign Lord King James and his heirs, and truth and faith shall bear of life and member and terrene honour, and you shall neither know nor hear of any ill or damage intended unto him that you shall not defend. So help you Almighty God." The substance and effect hereof is, as hath been said, due by the law of nature, *ex institutione naturæ*, as hereafter shall appear: the form and addition of the oath is, *ex provisione hominis*. In this oath of ligeance five things were observed. 1. That for the time it is indefinite, and without limit, "from this day forward." Secondly, two excellent qualities are required, that is, to be "true and faithful." 3. To whom, "to our Sovereign Lord the King and his heirs:" (and albeit Britton doth say, to the K. of Eng. that is spoken *proper excellentiam*, to design the person, and not to confine the ligeance; for a subject doth not swear his ligeance to the King, only as King of England; and not to him

(a) 3 Inst. 11.
Dy. 145. pl. 62.
Cawly 185.
Hob. 271.
Co. Lit. 129 a.
(b) 3 Inst. 5, 11.
Bacon's Hist.
H. 7. fo. 11.
6 East 592.

Ligeantia legalis.

Co. Lit. 68 b.

Co. Lit. 68 b.

[*7 a.]

(a) *Vid. Rex v. Depardo*, 1 Taunt. 26, that a manslaughter committed in China, by an alien enemy, who had been a prisoner of war, and was then acting as a mariner on board an English merchant-ship, and the

deceased being an Englishman, cannot be tried here under a commission issued in pursuance of the statutes 33 H. 8. c. 23, and 43 Geo. 3. c. 113. § 6.

as King of Scotland, or of Ireland, &c. but generally to the King.) 4. In what manner; "and faith and troth shall bear, &c. of life and member," that is, until the letting out of the last drop of our dearest heart's blood. 5. Where and in what places ought these things to be done, in all places whatsoever, for, "you shall neither know nor hear of any ill or damage, &c." that you shall not defend, &c. so as natural ligeance is not circumscribed within any place. It is holden 12 H. 7. 18. b. That he that is sworn in the leet, is sworn to the King for his ligeance, that is, to be true and faithful to the King; and if he be once sworn for his ligeance, he shall not be sworn again during his life. And all letters patent of denization be, that the patentee shall behave himself *tanquam verus et fidelis ligeus domini Regis*. And this oath of ligeance at the torn and leet was first instituted by King Arthur; for so I read, *Inter leges Sancti Edwardi Regis ante conquestum* 3 cap. 35. *Et quod omnes principes et comites, proceres, milites, et liberi homines debent jurare, &c. in Folkemote, et similiter omnes proceres regni, et milites et liberi homines universi totius regni Britann' facere debent in pleno Folkemote fidelitatem domino Regi, &c.* *Hanc legem invenit Arthurus qui quondam fuit inclytissimus Rex Britonum, &c. hujus legis autoritate expulit Arthurus Rex Saracenos et inimicos a regno, &c. et hujus legis autoritate Etheldredus Rex uno et eodem die per unicum regnum Danos occidit. Vide Lambert inter leges Regis Edwardi, * &c. fol. 135 et 136.* By this it appeareth, when and from whom this legal ligeance had his first institution within this realm. *Ligeantia*, in the case in question, is meant and intended of the first kind of ligeance, that is, of ligeance natural, absolute, &c. due by nature and birth-right. But if the plaintiff's father be made a denizen, and purchase lands in England to him and his heirs, and die seised, this land shall never descend to the plaintiff, for that the King by his letters patent may make a denizen, but cannot naturalize him to all purposes, as an act of Parliament may do; neither can letters patent make any inheritable in this case, that by the common law cannot inherit. And herewith agreeth 56 H. 6. tit. Denizen Br. 9.

Co. 68 b.

Co. Lit. 68 b.
172 b.* See L. L.
Saxon, per
Wilkins,
p. 204.Co. Lit. 8 a.
129 a.
O. Bridg. 455.Homage is two-
fold. Co. Lit.
65 b.
Vaugh. 279.
[* 7 b.]Where natural
ligeance is due.

Homage in our book is two-fold, that is to say, *Homagium ligeum*; and that is as much as ligeance, of which Bracton speaketh, 1. 2. c. 35. f. 79. *Soli Regi debet sine dominio seu servitio*,* and there is *Homagium feudale*, which hath his original by tenure. In Fitz. Nat. Brev. 269. there is a writ for respiting of this later homage (which is due *ratione feodi sive tenuræ: scialis quod respectuamus homagium nobis de terr' et tenementis quæ tenenter de nobis in capite debet*). But *Homagium ligeum, i. e. ligeantia*, is inherent and inseparable, and cannot be respited.

3. Now are we come to (and almost past) the consideration of this circumstance, where natural ligeance should be due: for by that which hath been said, it appeareth, that ligeance, and faith and truth which are her members and parts, are qualities of the mind and soul of man, and cannot be circum-

scribed within the predicament of *ubi*, for that were to confound predicaments, and to go about to drive (an absurd and impossible thing) the predicament of quality into the predicament of *ubi*. *Non respondetur ad hanc questionem, ubi est?* to say, *Verus et fidelis subditus est; sed ad hanc questionem, qualis est? Recte et apte respondetur, verus et fidelis ligeus, &c. est.* But yet for the greater illustration of the matter, the point was handled by itself, and that ligeance of the subject was of as great an extent and latitude, as the royal power and protection of the King, *et è converso*. It appeareth by the stat. of 11 H. 7. cap. 1. and 2 E. 6. cap. 2. that the subjects of England are bound by their ligeance to go with the King, &c. in his wars, as well within the realm, &c. as without. And therefore we daily see, that when either Ireland, or any other of his Majesty's dominions, be infested with invasion or insurrection, the King of England sendeth his subjects out of England, and his subjects out of Scotland, also into Ireland, for the withstanding or suppressing of the same, to the end his rebels may feel the swords of either nation. And so may his subjects of Guernsey, Jersey, Isle of Man, &c. be commanded to make their swords good against either rebel or enemy, as occasion shall be offered; whereas if natural ligeance of the subjects of England should be local, that is, confined within the realm of England or Scotland, &c. then were not they bound to go out of the continent of the realm of England or Scotland, &c. And the opinion of Thirninge in 7 H. 4. tit. Protect' 100. is thus to be understood, that an English subject is not compellable to go out of the realm without wages, according to the statutes of 1 E. 3. c. 7. 18 E. 3. c. 8. 18 H. 6. c. 19, &c. 7 H. 7. c. 1. 3 H. 8. c. 5, &c. In ann. 25 E. 1. Bigot Earl of Norfolk and Suffolk, and Earl Marshal of England, and Bohun Earl of Hereford and High Constable of England, did exhibit a petition to the King in French (which I have seen anciently recorded) on the behalf of the Commons of England, concerning how and in what sort they were to be employed in his Majesty's wars out of the realm of England; and the record saith that, *post multas et varias altercationes*, it was resolved, they ought to go but in such manner and form as after was declared by the said statutes, which seem to be but declarative of the common law. And this doth plentifully and manifestly appear in our books, being truly and rightly understood. In 3 H. 6. tit. Protection 2. one had the benefit of a protection, for that he was sent into the King's wars *in comitiva* of the Protector; and it appeareth by the record, and by the chronicles also, that this employment was into France; the greatest part thereof then being under the King's actual obedience, so as the subjects of England were employed into France for the defence and safety thereof: in which case it was observed, that seeing the Protector, who was *Prorex*, went, the same was adjudged a voyage royal, 8 H. 6. fol. 16. b. the Lord Talbot went with a company of Englishmen into France, then also being for the greatest part under the actual obedience of

2 Inst. 47, 48, 528.

2 Inst. 528.

Maynard's F.
2. fo.
[* 8 a.]

2 Inst. 528.

Co. Lit. 130 b.

Co. Lit. 130 b.

Fitz. Protect. 5.
Br. Protect. 48.

the King, who had the benefit of their protections allowed unto them. And here were observed the words of the writ in the Register, fol. 88. where it appeareth, that men were employed in the King's wars out of the realm *per præceptum nostrum*, and the usual words of the writ of protection be in *obsequio nostro*. *32 H. 6. fol. 4. a. it appeareth, that Englishmen were pressed into Guyenne, + 44 E. 3. 12 a. into Gascoyne with the Duke of Lancaster, 17 H. 6. tit. Protection, into || Gascoyne with the Earl of Huntington, steward of Guienne, 11 and 12 H. 4. 7. into (a) Ireland, and out of this realm with the Duke of Gloucester and the Lord Knolles: *vide* (b) 19 H. 6. 35. b. And it appeareth in 19 Ed. 2. tit. Avowry 224. 26 Ass. 66. 7 H. 4. 19, &c. that there was *forinsecum servitium* foreign service, which Bracton, fol. 36. calleth *regale servitium*; and in Fitz. N. B. 28. that the King may send men to serve him in his wars beyond the sea. But thus much (if it be not in so plain a case too much) shall suffice for this point for the King's power, to command the service of his subjects in his wars out of the realm, whereupon it was concluded, that the ligeance of a natural-born subject was not local, and confined only to England. Now let us see what the law saith in time of peace, concerning the King's protection and power of command, as well without the realm, as within, that his subjects in all places may be protected from violence, and that justice may equally be administered to all his subjects.

[* 8 b.]

*In the Register, fol. 25 b. *Rex universis et singulis admirall', castellan', custodibus castrorum, villar', et aliorum fortalitiarum præpositis, vicecom' majoribus, custumariis, custodib' portuum, et alior' locor' maritimor' ballivis, ministr', et aliis fidel' suis, tam in transmarinis quam in cismarinis partib' ad quos, &c. salutem. Scialis, quod suscepimus in protectionem et defensionem nostram, necnon ad salvam et securam gardiam nostram W. veniendo in regnum nostrum Angl', et potestatem nostram, tam per terram quam per mare cum uno valetto suo, ac res ac bona sua quæcunque ad tractand' cum dilecto nostro et fideli L. pro redemptione prisonarii ipsius L. infra regnum et potestatem nostram præd' per sex menses morando et exinde ad propria redeundo. Et ideo, &c. quod ipsum W. cum valetto, rebus et bonis suis præd' veniendo in regn' et potestat' nostram præd' tam per terr' quam per mare ibid' ut prædict' est ex causâ antedictâ morando, et exinde ad propria redeundo, manuteneatis, protegatib', et defendatis; non inferentes, &c. seu gravamen. Et si quid eis forisfactum, &c. reformari faciat. In cujus, &c. per sex menses duratur'. T. &c.* In which writ three things are to be observed. 1. That the King hath *fidem et fideles in partib' transmarinis*. 2. That he hath *protection' in partib' transmarinis*. 3. That he hath *potestatem in partibus transmarinis*, In the Register fo. 26. *Rex universis et singulis admirallis, castellanis, custodibus castrorum, villarum, et aliorum fortalitiarum præpositis, vicecom' majoribus, custumariis, custodib' portuum, et alior' locor' maritimorum ballivis, ministris, et aliis fidelibus suis, tam in transmarinis quam in cismarinis partibus*

* Fitz. Protect. 13.
† Fitz. Protect. 35 Br. Protect. 24.
|| Fitz. Protect. 56.
(a) Fitz. Protect. 24. Co. Lit. 130 b.
Br. Protect. 34.
(b) Fitz. Protect. 8.
Br. Protect. 49.

ad quos, &c. salutem. Sciatis quod suscepimus in protectionem et defensionem nostram, necnon in saluum et securum conductum nostr' I. valetum P. et L. Burgensium de Lyons obsidum nostrorum, qui de licentiâ nostrâ ad partes transmarinas profecturus est, pro finantia magistrorum suorum prædict' obtinenda vel deferenda, eundo ad partes prædictas ibidem morando, et exinde in Angl' redeundo. Et ideo vobis mandamus, quod eidem I. eundo ad partes præd' ibidem morando, et exinde in Angl' redeundo, ut præd' est, in personâ, bonis, aut rebus suis, non inferatis, seu quantum in vobis sedit ab aliis inferri permittatis injuriam, molestiam, &c. aut gravamen. Sed eum potius saluum et securum conductum, cum per loca passus, seu districtus vestros transierit, et super hoc requisiti fueritis, suis sumptibus habere faciatis. Et si quid eis forisfactum fuerit, &c. reformari faciatis. In cujus, &c. per tres ann' durat' T. &c. And certainly this was, when Lyons in France (bordering upon Burgundy, an ancient friend to England), was under the actual obedience of King Henry VI. For the King commanded *fidelibus suis*, his faithful magistrates there, *that if any injury were there done, it should be by them reformed and redressed, and that they should protect the party in his person and goods in peace. In the Register, fol. 25. two other writs: *Rex omnibus seneschallis, majoribus, juratis, paribus præpositis, ballivis et fidelibus suis in ducatu Aquitanix ad quos, &c. salutem. Quia dilecti nobis T. et A. cives civitat' Burdegal' coram nobis in Cancellar' nost' Angl' et Aquitan' jura sua prosequentes, et metuentes ex verisimilibus conjecturis per quosdam sibi comminantes tam in corpore quam in rebus suis, sibi posse grave damnum inferri, supplicaverunt nobis sibi de protectione regia providere: nos volentes dictos T. et A. ab oppressionibus indebitis præservare, suscepimus ipsos T. et A. res ac justas possessiones et bona sua quæcunque in protectionem et salvam gardiam nostram specialem. Et vobis et cuilibet vestrum injungimus et mandamus, quod ipsos T. et A. familias, res ac bona sua quæcunque a violentiis et gravaminibus indebitis defendatis, et ipsos in justis possessionibus suis manuteneatis. Et si quid in præjudicium hujus protectionis et salvæ gardiæ nost' attentatum inveneritis, ad statum debitum reducalis. Et ne quis se possit per ignorantiam excusare. præsentem protectionem et salvam gardiam nostram faciatis in locis de quibus requisiti fueritis infra district' vestrum publice intimari, inhibentes omnibus et singulis sub pænis gravibus, ne dictis A. et T. seu famulis suis in personis seu rebus suis, injuriam molestiam, damnum aliquod inferant seu gravamen: et penocellas nostras in locis et bonis ipsorum T. et A. in signum protectionis et sal' gard' memorat', cum super hoc coquisiti fueritis, apponatis. In cujus, &c. dat' in palatio nostro Westm' sub magni sigilli testimonio, sexto die Augusti anno 44 E. 3.—Rex universis et singulis seneschallis, constabular' castellanis, præpositis, minist', et omnibus ballivis et fidelibus suis in dominio nostro Aquitan' constitutis ad quos, &c. salut'. Volentes G. et R. uxor ejus favore prosequi gratiose, ipsos G. et R. homines et familias suas ac justas possessiones, et bona sua quæcunque, suscepimus in protectionem et defensionem nostram,*

[* 9 a.]

[*9 b.]

Cawley 139.

Cobledike's
case temp. E. 1.
reported by
Hingham.
Ellesmere's
Postnati 91,
92.

*necnon iu salvam gardiam nostram specialem. Et ideo vobis et cuilibet vestrum injungimus et mandamus, quod ipsos G. et R. eorum homines, familias suas, ac justas possessiones et bona sua quacunque manuteneatis, protegatis, et defendatis: non inferentes eis seu quantum in vobis est ab aliis inferri permittentes, injuriam, molestiam, damnum, violentiam, impedimentum aliquod seu gravamen. Et si quid eis forisfact', injuriatum vel contra eos indebite attentatum fuerit, id eis sine dilatione corrigi, et ad statum debitum reduci faciatis, prout ad vos et quemlibet vestrum noveritis pertinere: penocellas super domibus suis in signum presentis saltæ gardiæ nostræ (prout moris erit) facientes. In cujus, &c. per unum annum duratur'. T. &c. *By all which it is manifest, that the protection and government of the King is general over all his dominions and kingdoms, as well in time of peace by justice, as in time of war by the sword, and that all be at his command, and under his obedience. Now seeing power and protection draweth ligeance, it followeth, that seeing the King's power, command, and protection extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof. He that is abjured the realm, *Qui abjurat regnum amittit regnum, sed non regem, amittit patriam, sed non patrem patriæ*: for notwithstanding the abjuration, he oweth the King his ligeance, and he remaineth within the King's protection; for the King may pardon and restore him to his country again. So seeing that ligeance is a quality of the mind, and not confined within any place; it followeth, that the plea that doth confine the ligeance of the plaintiff to the kingdom of Scotland, *infra ligeantiam regis regni sui Scotiæ, et extra ligeantiam regis regni sui Angliæ*, whereby the defendants do make one local ligeance for the natural subjects of England, and another local ligeance for the natural subjects of Scotland, is utterly insufficient, and against the nature and quality of natural ligeance, as often it hath been said. And Coke, Chief Justice of the Court of Common Pleas, cited a ruled case out of Hingham's reports, *tempore E. 1.* which in his argument he shewed in Court written in parchment, in an ancient hand of that time. Constance de N. brought a writ of Ayel against Roger de Cobledike and others, named in the writ, and counted that from the seisin of Roger her grandfather it descended to Gilbert his son, and from Gilbert to Constance, as daughter and heir. *Sutton dit, Sir, el ne doit este responde, pur ceo que el est Francois et nient de la ligeance ne a la foy Denglitterre, et demand judgement si el doit action aver*: that is, she is not to be answered, for that she is a French woman, and not of the ligeance, nor of the faith of England, and demanded judgment, if she this action ought to have. Beresford (then Chief Justice of the Court of Common Pleas) by the rule of the Court disalloweth the plea, for that it was too short, in that it referred ligeance and faith to England, and not to the King: And thereupon Sutton saith as followeth: *Sir, nous voilomus averre que el ne est my de la ligeance Denglitterre, ne a la foy le Roy et demand judgement, et si vous agardes que el doit este responde, nous dir-**

romus assets : that is, Sir, we will aver, that she is not of the ligeance of England, nor of the faith of the King, and demand judgment, &c. ; *which latter words of the plea (nor of the faith of the King) referred faith to the King indefinitely and generally, and restrained not the same to England, and thereupon the plea was allowed for good, according to the rule of the Court: for the book saith, that afterward the plaintiff desired leave to depart from her writ. The rule of that case of Cobiedike, did (as Coke, Chief Justice, said) over-rule this case of Calvin, in the very point now in question ; for that the plea in this case doth not refer faith or ligeance to the King indefinitely and generally, but limiteth and restraineth faith and ligeance to the kingdom : *Extra ligeantiam Regis regni sui Angliæ*, out of the ligeance of the King of his kingdom of England ; which afterwards the Lord Chancellor and the Chief Justice of the King's Bench, having copies of the said ancient report, affirmed in their arguments. So as this point was thus concluded, *Quod ligeantia naturalis nullis claustris coercetur, nullis melis refrænatur, nullis finibus premitur.*

4 and 5. By that which hath been said, it appeareth, that this ligeance is due only to the King ; so as therein the question is not now, *cui, sed quomodo debetur*. It is true, that the King hath two capacities in him : one a natural body, being descended of the blood royal of the realm ; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like ; the other is a || politic body or capacity, so called, because it is framed by the policy of man (and in 21 E. 4. 39. b. is called a mysticall body;) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, (a) nonage, &c. Pl. Com. in the case of the Lord Barkley, 234. and in the case of the Duchy 213. 6 E. 3. 291. and 26 Ass. pl. 54. Now, seeing the King hath but one person, and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered, to which capacity ligeance is due. And it was resolved, that it was due to the natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity), and it is not due to the politic capacity only, that is, to his crown or kingdom distinct from his natural capacity, and that for divers reasons. First, every subject (as it hath been affirmed by those that argued against the plaintiff) is presumed by law to be sworn to the King, which is to his natural person, and likewise the King is sworn to his subjects, (as it appeareth in Bracton, lib. 3. *De Actionibus*, cap. 9. fol. 107.) which oath he taketh in his natural *person : for the politic capacity is invisible and immortal ; nay, the politic body hath no soul, for it is framed by the policy of man. 2. In all indictments of treason, when any do intend or compass *mortem et destructionem domini Regis* (which must needs be understood of his natural body, for his politic body is immortal, and not subject to death,) the indictment

Note.

[* 10 a.]

To whom and how ligeance is due.

|| Politic Body. 1 Inst. 15 b. 16.

(a) Postea 12. a. Co. Lit. 43 a. 5 Co. 27 a. Plowd. 213 a. 221 a. 364 b. 26 Ass. 54. Fitz. Infant 15. Br. Age 34.

[* 10 b.]

(a) Antea 6.
a. b. 3 Inst. 11.
Hob. 271. Dy.
143. pl. 62.
Cawly 185.
Co. Lit. 129 a.

(b) This case is
not in the book
at large, but is
in the Abridg-
ment of Dy. fo.
32. Stow's
Abridgm.
p. 1062 1064.
Spred's Chron.
p. 1127. col. 2.
num. 100.
(c) 10 Co. 32 b.
Co. Lit. 66 b.
4 Co. 11 a.

(d) 3 Inst. 7.

[* 11 a.]

(e) 3 Inst. 7.

concludeth, *contra* (a) *ligeantia suæ debitum*; ergo, the ligeance is due to the natural body. *Vide* Fit. Justice of Peace 53. and Pl. Com. 384. in the Earl of Leicester's case. 3. It is true, that the King in *genere* dieth not; but, no question, in *individuo* he dieth: as for example, H. 8. E. 6. &c. and Queen Eliz. died, otherwise you should have many Kings at once. In 2 and 3 Ph. and Mar. Dyer 128. (b) one Constable dispersed divers bills in the streets in the night, in which it was written, that King E. 6. was alive, and in France, &c.; and in Coleman-street in London, he pointed to a young man, and said, that he was King Edward the Sixth. And this being spoken *de individuo* (and accompanied with other circumstances) was resolved to be high treason; for the which Constable was attainted and executed. 4. A (c) body politic (being invisible) can as a body politic neither make or take homage: *Vide* 33 H. 8. tit. Fealty, Brook 15. 5. *In fide*, in faith or ligeance nothing ought to be feigned, but ought to be *ex fide non ficta*. 6. The King holdeth the kingdom of England by birth-right inherent, by descent from the blood royal, whereupon succession doth attend; and therefore it is usually said, to the King, his heirs, and successors, wherein heirs is first named, and successors is attendant upon heirs. And yet in our ancient books succession and successor are taken for hereditance and heirs. Bract. lib. 2. *de acquirendo rerum dominio*, c. 29. *Et sciend' est quod hereditas est successio in universum jus quod defunctus antecessor habuit, ex causâ quacunque acquisitionis vel successionis, et alibi affinitatis jure nulla successio permittitur*. But the title is by descent; by Queen Elizabeth's death the crown and kingdom of England descended to his Majesty, and he was fully and absolutely thereby King, without any essential ceremony or act to be done *ex post facto*: for coronation is but a royal ornament and solemnization of the royal descent, but no part of the title. In the first year of his Majesty's reign, before his Majesty's coronation, Watson (d) and Clerke, Seminary Priests, and others, were of opinion, that his Majesty was no complete and absolute King before his coronation, but that coronation did add a confirmation and perfection to the descent; and therefore (observe their damnable and damned consequent) that they by *strength and power might before his coronation take him and his royal issue into their possession, keep him prisoner in the Tower, remove such counsellors and great officers as pleased them, and constitute others in their places, &c. And that these and other (acts) of like nature could not be treason against his Majesty, before he were a crowned King. But it was clearly resolved by all the Judges of England, that presently by the descent his Majesty was completely and absolutely King, without any essential ceremony or act to be done *ex post facto*, and that (e) coronation was but a royal ornament, and outward solemnization of the descent. And this appeareth evidently by infinite precedents and book cases, as (taking one example in a case so clear for all) King Henry VI. was not crowned until the 8th year of

his reign, and yet divers men before his coronation were attainted of treason, of felony, &c. and he was as absolute and complete a King, both for matters of judicature, as for grants, &c. before his coronation, as he was after, as it appeareth in the Reports of 1, 2, 3, 4, 5, 6, and 7 years of the same King. And the like might be produced for many other Kings of this realm, which for brevity in a case so clear I omit. But which it manifestly appeareth, that by the laws of England there can be no † *inter regnum* within the same. If the King be seised of land by a defeasible title, and dieth seised, this descent shall toll the entry of him that right hath, as it appeareth by 9 (a) E. 4. 51. But if the next King had it by succession, that should take away no entry, as it appeareth by Littleton, fol. 97. If a disseisor of an infant convey the land to the King who dieth seised, this descent taketh away the entry of the infant, as it is said in 34 H. 6. fol. 34. (b) 45. lib. Ass. pl. 6. Plow. Com. 234. where the case was; K. H. 3. gave a manor to his brother the Earl of Cornwall in tail (at what time the same was a fee-simple conditional) K. H. 3. died, the Earl before the statute of *Donis conditional* (having no issue) by deed exchanged the manor with warranty for other lands in fee, and died without issue, and the warranty and assets descended upon his nephew King Edward I.; and it was adjudged, that this warranty and assets, which descended upon the natural person of the King, barred him of the possibility of reverter. In the reign of Ed. 2. the Spencers, the father and the son, to cover the treason hatched in their hearts, invented this damnable and damned opinion, that homage and oath of ligeance was more by reason of the King's crown (that is, of his politic capacity) than by reason of the person of the *King, upon which opinion they inferred execrable and detestable consequences: 1. If the King do not demean himself by reason in the right of his crown, his lieges be bound by oath to remove the King. 2. Seeing that the King could not be reformed by suit of law that ought to be done by the sword. 3. That his lieges be bound to govern in aid of him, and in default of him. All which were condemned by two Parliaments, one in the reign of Ed. 2. called *Exilium Hugonis le Spencer*, and the other in Ann 1. Ed. 3. c. 1. Bracton, lib 2. *de acquirendo rerum dominio*, c. 24. f. 55, saith thus, *Est enim corona Regis facere justitiam et judic', et tenere pacem, et sine quibus corona consistere non potest nec tenere; hujusmodi autem jura sive jurisdictiones ad personas vel tenementa transferri non poterunt, nec a privato personâ possideri, nec usus nec executio juris, nisi hoc datum fuit ei desuper, sicut jurisdictio delegata delegari non poterit quin ordinaria remaneat cum ipso Rege. Et lib. 3. De Actionibus, cap. 9. fol 107. Separare autem debet Rex, cum sit De vicarius in terrâ, jus ab injuriâ, æquam ab iniquo, ut omnes sibi subjecti honeste vivant, et quod nullus alium lædat, et quod unicuique quod suum fuerit rectâ contributione reddatur.* In respect whereof one saith, that *corona est quasi cor ornans, cujus ornamenta sunt misericordia et justitia.* And therefore a King's crown is an hieroglyphic of the laws, where justice, &c. is administered; for so saith P. Val. 1. 41. p. 400.

† Q. If not so between K. J. 2. abdication and K. W. 3. succession? post. 12 a. (a) 4 Co. 58 b.

(b) 10 Co. 96 b. Co. Lit. 19 b. 370 b, Plowd. 234 a. 553 b. Fitz. Garrantry 68. Br. Assets per Descent. 31. Br. Tail 34. Br. Prærog. 52. Br. Serch. pur le Roy 5. Br. Garrantry 52. 9 Co. 132 b. 1 H. P. C. 67.

[* 11 b.]

Pryn's Sovereign Power of Parliament 2, Part pa. 43. Cro. Arg. 64.

Coronam dicimus legis judicium esse, propterea quod certis est vinctulis complicata, quibus vita nostra veluti religata coercetur. Therefore if you take that which is signified by the crown, that is, to do justice and judgment, to maintain the peace of the land, &c. to separate right from wrong, and the good from the ill: that is to be understood of that capacity of the King, that *in rei veritate* hath capacity, and is adorned and endued with endowments as well of the soul as of the body, and thereby able to do justice and judgment according to right and equity, and to maintain the peace, &c. and to find out and discern the truth, and not of the invisible and immortal capacity that hath no such endowments; for of itself it hath neither soul nor body. And where divers books and acts of Parliament speak of the ligeance of England, as 31 E. 3. tit. Cosinage 5. 42 Ed. 3. 2. 13 E. 3. tit. Brief 677. 25 Ed. 3. *Stat. de natis ultra mare.* All these and other speaking briefly in a vulgar manner (for (a) *loquendum ut vulgus*) and not pleading (for *sentendum ut docti*) are to be understood of the ligeance due by the people of England to the King; for no man will affirm, that England itself, taking it for the continent thereof, doth owe any *ligeance or faith, or that any faith or ligeance should be due to it: but it manifestly appeareth, that the ligeance or faith of the subject is *proprium quarto modo* to the King, *omni soli et semper*. And oftentimes in the reports of our book cases, and in acts of parliament also, the crown or kingdom is taken for the King himself, as in † Fitzh. Natur. Brev. fol. 5. Tenure *in capite* is a tenure of the crown, and is a seignory in gross, that is of the person (c) of the King: and so is 50 H. 8. Dyer fol. 44, 45. a tenure in chief, as of the crown, is merely the tenure of the person of the King and therewith agreeth 28 H. 8. tit. Tenure 65. Br. The statute of 4 H. 5. cap. ultimo gave Priors aliens, which were conventual to the King and his heirs, by which gift saith 34 H. 6. 34. the same were annexed to the crown. And in the said act of 25 Ed. 3. whereas it is said in the beginning, within the ligeance of England, it is twice afterwards said in the said act within the ligeance of the King, and yet all one ligeance due to the King. So in 42 Ed. 3. fol. 2. where it is first said, the ligeance of England, it is afterwards in the same case called the ligeance of the King; wherein though they used several manner and phrases of speech, yet they intended one and the same ligeance. So in our usual commission of assise, of gaol delivery, of oyer and terminer, of the peace, &c. power is given to execute justice, *secundum legem et consuetudinem regni nostri Angliæ*; and yet Littleton, lib. 2. in his chapter of Villenage, fol. 43. in disabling of a man that is attainted in a præmunire saith, that the same is the King's law; and so doth the Register in the writ of *Ad jura regia* style the same.

The reasons wherefore the King by judgment of law hath a politic capacity. 1 H. 7. 5.

The reasons and causes wherefore by the policy of the law the King is a body politic, are three, viz. 1. *causa majestatis*,

(c) Vid. Hargrave's note 1. Co. Lit. 77 a.

2. *causa necessitatis*, and 3. *causa utilitatis*. First, *causa majestatis*, the King cannot give or take but by matter of record for the dignity of his person. Secondly, *causa necessitatis*, as to avoid the (a) attainder of him that hath right to the crown, as it appeareth in 1 H. 7. 4. lest in the *interim* there should be an (b) *interregnum*, which the law will not suffer. Also by force of this politic capacity, though the (c) King be within age, yet may he make leases and other grants, (d) and the same shall bind him; otherwise his revenue should decay, and the King should not be able to reward service, &c. Lastly, *causa utilitatis*, as when lands and possessions descend from his collateral ancestors, being subjects, as from the Earl *of March, &c. to the King, now is the King seised of the same *in jure coronæ*, in his politic capacity; for which cause the same shall go with the crown; and therefore, albeit Queen Elizabeth was of the half blood to Queen Mary, yet she in her body politic enjoyed all those fee-simple lands, as by the law she ought, and no collateral cousin of the whole blood to Queen Mary ought to have the same. And these are the causes wherefore by the policy of the law the King is made a body politic: so as for these special purposes the law makes him a body politic, immortal and invisible, whereunto our liegiance cannot appertain. But to conclude this point, our liegiance is to our natural liege Sovereign, descended of the blood royal of the Kings of this realm. And thus much of this general part *De ligeantia*.

(a) Co. Lit. 16 a. Bacon's ii. 7. fo. 8, 9.
Fitz. Parl. 2 Br. Parl. 37. 105. Plowd. 238 b.
(b) 1 W. & M. cap. 4. sect. 10. Co. Lit. 43 a.
(c) 5 Co. 27 a. [* 12 b.]
1 Roll. 728. Plowd. 213 a. 238. 221 a. 364. b. 26 Ass. 54. Fitz. Enfant 15. Br. Age 14. 5 Mod. 55. Co. Lit. 15 b. See Treby's Argument in the Quo Warranto.

Now followeth the second part, *de legibus*, wherein these parts were considered: first, that the liegiance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England: thirdly, that the law of nature was before any judicial or municipal law: fourthly, that the law of nature is immutable.

De Legibus.
The second general part.

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex æterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world. The Apostle in the Second Chapter to the Romans saith, *Cum enim gentes quæ legem non habent naturaliter ea quæ legissent faciunt*. And this is within the command of that moral law, *honora patrem*, which doubtless doth extend to him that is *pater patriæ*. And that Apostle saith, *Omnis anima potestatibus sublimioribus subdita sit*. And these be the words of the Great Divine, *Hoc Deus in Sacris Scripturis jubet, hoc lex naturæ dictari, ut quilibet subditus obediat superio*, And Aristotle, Nature's Secretary, lib. 5. *Æthic.* saith, that *jus naturale est, quod apud omnes homines eandem habet potentiam*. And herewith doth agree Bracton, lib. 1. cap. 5. and Fortescue, cap. 8. 12. 13. and 16. Doctor and Student, cap. 2. and

The law of nature.
Wing's Max. 1. Co. Lit. 11 b. post. 14 b.

Justinian's Inst. lib. 1. cap. 2.

(d) Vid. as to the King's grants the notes et seq. to the case of *Alton Woods*, Vol. 1. p. 100.

Note.

[* 13 a.]

Postea 25 a.

4. And the reason hereof is, for that God and nature is one *to all, and therefore the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior. And Aristotle 1. *Politiconum* proveth, that to command and to obey is of nature, and that magistracy is of nature: for whatsoever is necessary and profitable for the preservation of the society of man is due by the law of nature: but magistracy and government are necessary and profitable for the preservation of the society of man; therefore magistracy and government are of nature. And herewith accordeth Tully, *lib. 3. De legibus, sine imperio nec domus ulla, nec civitas, nec gens, nec hominum universum genus stare, nec ipse denique mundus potest.* This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws. And certain it is, that before judicial or municipal laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of law, but did *dare jura*. And this appeareth by Fortescue, cap. 12 and 13. and by Virgil that philosophical poet, 7th *Æneid*.

*Hoc Priami gestamen erat, cum jura vocatis
More daret populis.*

And 5th *Æneid*.

——— *Gaudet regno Trojanus Accstes,
Indicique forum et partibus dat jura vocatis.*

And Pomponius, *lib. 2. cap. De origine juris*, affirmeth, that in Tarquinius Superbus's time there was no civil law written, and that Papirius reduced certain observations into writing, which was called *Jus Civile Papirianum*. Now the reason wherefore laws were made and published, appeareth in Fortescue, cap. 13. and in Tully, *lib. 2. Officiorum: at cum jus æquabile ab uno viro homines non consequerentur, inventi sunt leges.* Now it appeareth by demonstrative reason, that ligeance, faith, and obedience of the subject to the Sovereign, was before any municipal or judicial laws. 1. For that government and subjection were long before any municipal or judicial laws. 2. For that it had been in vain to have prescribed laws to any but to such as owed obedience, faith, and ligeance before, in respect whereof they were bound to obey and observe them: *Frustra enim *feruntur leges nisi subditis et obediuntibus.* Seeing then that faith, obedience, and ligeance, are due by the law of nature, it followeth, that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisted in commanding or prohibiting, without any certain punishment or penalty), yet the very law of nature itself never was nor could be (a) altered or changed. And therefore it is certainly true, that (b) *jura naturalia sunt immutabilia.* And herewith agreeth Bracton, *lib. 1. cap. 5.*

(a) 1 Black. 41.
57.

Dr. and Stud.

4. a. ante 12 b.

(b) Cart. 130.

and Doctor and Student, cap. 5 and 6. And this appeareth plainly and plentifully in our books.

If a man hath a ward (E) by reason of a seigniori, and is outlawed. he forfeiteth the wardship to the King: but if a man hath the wardship of his own son or daughter, which is his heir apparent, and is outlawed, he doth not (a) forfeit this wardship; for nature hath annexed it to the person of the father, as it appeareth in 33 H. 6. 55. b. *Et bonus Rex nihil a bono patre differt, et patria dicitur a patre, quia habet communem patrem, qui est pater patriæ.* In the same manner, *maris et fœminæ conjunctio est de jure naturæ*, as Bracton, in the same book and chapter, and St. Germin in his book of the Doctor and Student, cap. 5., do hold. Now, if he that is attainted of treason or felony, be slain by one that hath no authority, or executed by him that hath authority, but pursueth not his warrant, in this case his eldest son can have no appeal, (E) for he must bring his appeal as heir, which being *ex provisione hominis*, he loseth it by the attainder of his father; but his (b) wife (if any he have) shall have an appeal, because she is to have her appeal as wife, which she remaineth notwithstanding the attainder, because *maris et fœminæ conjunctio est de jure naturæ*, and therefore (it being to be intended of true and right matrimony) is indissoluble; and this is proved by the book in 33 H. 6. 57. So if there be mother and daughter, and the daughter is attainted of felony, now cannot she be heir to her mother for the cause aforesaid; yet after her attainder, if she kill her mother, this is parricide and petit treason; for yet she remaineth her daughter, for that is of nature, and herewith agreeth 21 E. 3. 17. b. If a man be attainted of felony or treason, he hath lost the King's legal protection, for he is thereby utterly disabled to sue any action real or personal (which is a greater disability than an alien in league hath) and yet such a person so attainted hath not lost that *protection which by the law of nature is given to the King, for that is *indelebilis et immutabilis*, and therefore the King may protect and pardon him, and if any man kill him without warrant, he shall be punished by the law as a manslayer, and thereunto accordeth 4 Ed. 4. and 35 H. 6. 57. 2 Ass. pl. 3. By the statute of 25 Ed. 3. cap. 22. a man attainted in a *Præmunire*, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth by Littleton, fol. 43. for the Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute, the King may protect and pardon him. And though by that statute it was farther enacted, that it should be done with him as with an enemy, by which words any man might have slain such a person (as it is holden in 24 H. 8. tit. Coron. Br. 197.) until the statute

(a) 3 Co. 39 a.
7 Co. 12 b.
Co. Lit. 84 b.
Br. Gard. 6.
Br. Forfeit. 70.
Plowd. 294 a.
Englefield's
case. 2 Inst.
234.

Q.
(b) Stamf. Cor.
59. c. 35 H. 6.
58 a. Br. Ap-
peal 5. 131.
Fitz. Cor. 21.
2 Inst. 215.

[* 14 a.]

Cawly 47.
3 Inst. 126.

Q.

Co. Lit. 130 a.
B. N. C. 53.
Co. Lit. 130 a.
2 Bulst. 299. Cawly 46, 47.

(E) Wardships, by reason of knight's service abolished, stat. 12 Car. 2, cap. 24.

(F) Appeals of treason, felony, and other offences abolished, stat. 59 Geo. 3. cap. 46.

Co. Lit. 128 b.

Br. Corone 67.

23 H. 6. c. 8.

Plowd. 502 b.
2 H. 7. 6 b.
Br. Patents
109.
12 Co. 18.

+ i. e. of Scot-
land.
[* 14 b.]

(a) Ellesmere's
Postnat. c. 68.
4 Co. 118 a.
Cawly 209. Antea 2b. Moor 793, 834.

made *anno* 5 Eliz. cap. 1. yet the King might protect and pardon him. A man outlawed is out of the benefit of the municipal law; for so saith Fitz. N. B. 161. a. *utlagatus est quasi extra legem positus*: and Bract. 1. 3. tract. 2. c. 11. saith, that *caput geret lupinum*; and yet is he not out either of his natural ligeance, or of the King's natural protection; for neither of them is tied to municipal laws, but is due by the law of nature, which (as hath been said) was long before any judicial or municipal laws. And therefore if a man were outlawed for felony, yet was he within the King's natural protection, for no man but the Sheriff could execute him, as it is adjudged in 2 lib. Ass. pl. 3. Every subject is by his natural ligeance bound to obey and serve his Sovereign, &c. It is enacted by the Parliament of 23 H. 6. that no man should serve the King as Sheriff of any county, above one year, and that notwithstanding any clause of *non obstante* to the contrary, that is to say, notwithstanding that the King should expressly dispense with the said statute: howbeit it is agreed in 2 H. 7. that against the express purview of that act, the King may, by a special *Non obstante* dispense with that act, for that the act could not bar the King of the service of his subject, which the law of nature did give unto him. By these and many other cases that might be cited out of our books, it appeareth, how plentiful the authorities of our laws be in this matter. Wherefore to conclude this point (and to exclude all that hath been or could be objected against it) if the obedience and ligeance of the subject to his Sovereign be due by the law of nature, if that law be parcel of the laws as well of England, as of all other nations, and is immutable, and that *Postnati*[†] and we of England are united by birth-right, *in obedience and ligeance (which is the true cause of natural subjection) by the law of nature; it followeth that Calvin the plaintiff being born under one ligeance to one King, cannot be an alien born; and there is great reason, that the law of nature should direct this case, wherein five natural operations are remarkable: first the King hath the crown of England by birth-right; being naturally procreated of the blood royal of this realm: secondly, Calvin the plaintiff naturalized by procreation and birth-right, since the descent of the crown of England: thirdly, ligeance and obedience of the subject to the Sovereign, due by the law of nature: fourthly, protection and government due by the law of nature: fifthly, this case, in the opinion of divers, was more doubtful in the beginning, but the further it proceeded, the clearer and stronger it grew; and therefore the doubt grew from some violent passion, and not from any reason grounded upon the law of nature, *quia quanto magis violentus motus (qui fit contra naturam) appropinquat ad suum finem, tanto debiliores et tardiores sunt ejus motus; sed naturalis motus, quanto magis appropinquat ad suum finem, tanto fortiores et velociore sunt ejus motus*. Hereby it appeareth how weak the objection grounded upon the rule of (a) *quanto duo jura concurrunt in una persona*, &c. is; for that rule holdeth not

in personal things, that is, when two persons are necessarily and inevitably required by law, as in the case of an alien born there is; and therefore no man will say, that now the King of England can make war or league with the King of Scotland, *et sic de cæteris*; and so in case of an alien born, you must of necessity have two several ligeances to two several persons. And to conclude this point concerning laws, *non adservatur diversitas regnor' sed regnant', non patriarum, sed patrum patriar', non coronarum, sed coronatorum, non legum municipalium, sed regum majestatum*. And therefore thus were directly and clearly answered, as well the objections drawn from the severalty of the kingdoms, seeing there is but one head of both, and the *Postnati* and us joined in ligeance to that one head, which is *copula et tanquam oculus* of this case; as also the distinction of the laws, seeing that ligeance of the subjects of both kingdoms, is due to their Sovereign by one law, and that is the law of nature.

For the third, it is first to be understood, that as the law hath wrought four unions, so the law doth still make four separations: The first union is of both kingdoms under one natural liege Sovereign King, and so acknowledged by the act of *Parliament of recognition. The 2d is an union of ligeance and obedience of the subjects of both kingdoms, due by the law of nature to their Sovereign: and this union doth suffice to rule and overrule the case in question; and this in substance is but a uniting of the hearts of the subjects of both kingdoms one to another, under one head and Sovereign. The 3d union is an union of protection of both kingdoms, equally belonging to the subjects of either of them: and therefore the two first arguments or objections drawn from two supposed several ligeances were fallacious, for they did *disjungere conjungenda*. The 4th union and conjunction is of the three lions of England, and that one of Scotland, united and quartered in one escutcheon.

The 3d general part concerning both kingdoms.

[*15 a.]

Concerning the separations yet remaining:—1. England and Scotland remain several and distinct kingdoms. 2. They are governed by several judicial or municipal laws. 3. They have several distinct and separate parliaments. 4. Each kingdom hath several nobilities: for albeit a *postnatus* in Scotland, or any of his posterity, be the heir of a nobleman of Scotland, and by his birth is legitimated in England, yet he is none of the (a) peers or nobility of England; for his natural ligeance and obedience, due by the law of nature, maketh him a subject and no alien within England: but that subjection maketh him not noble within England; for that nobility had his original by the King's creation, and not of nature. And this is manifested by express authorities, grounded upon excellent reasons in our books. If a baron, viscount, earl, marquis, or duke of England, bring any action, real or personal, and the defendant pleadeth in abatement of the writ that he is no baron, viscount, earl, &c. and thereupon the demandant or plaintiff taketh issue; this issue shall not be tried by jury,

(a) Dyer 360.
pl. 6. 9 Co. 117.
a. b. 2 Inst. 48.

(a) Co. Lit. 16. b.
6 Co. 53. a.
9 Co. 31. a. 49. a.
12 Co. 70, 94, 95.
2 Inst. 50.
2 Rell. 575.
Moor 767.

but by the (a) record (c) of parliament, whether he or his ancestor, whose heir he is, were called to serve there as a peer, and one of the nobility of the realm. And so are our books adjudged in 22 Ass. 24. 48 Edw. 3. 30. 35 H. 6. 40. 20 Eliz. Dyer 360. *Vide* in the Sixth Part of my Reports, in the Countess of Rutland's case. So as the man, that is not *de jure* a peer, or one of the nobility, to serve in the Upper House of the Parliament of England, is not in the legal proceedings of law accounted noble within England. And therefore if a countess of France or Spain, or any other foreign kingdom, should come into England, he should not here sue, or be sued by the name of countess, &c. for that he is none of the nobles that are members of the *Upper House of the Parliament of England; and herewith agree the book-cases of (b) 20 Ed. 4. 6. a. b. and 11 Ed. 3. Tit. Bre. 473. like law it is, and for the same reason, of an earl or baron of Ireland, he is not any peer, or of the nobility of this realm: and herewith agreeth the book in 8. R. 2 Tit. (c) *Proces. pl. ultim.*; where in an action of debt, process of outlawry was awarded against the earl of Ormond in Ireland; which ought not to have been, if he had been noble here. *Vide* Dyer (d) 20 Eliz. 360.

[* 15 b.]

(b) 9 Co. 117. b.
Br. *nomine de*
dignity 49.

(c) 9 Co. 117. b.
Fitz. Proc. 234.

(d) Dy. 360. pl. 6.
Co. Lit. 261. b.
Acc. Freem.
249.

(e) Moor 803.
9 Co. 117. b.
Postea 16. a.

(f) Moor 803.

But yet there is a diversity in our books worthy of observation; for the highest and lowest dignities are universal: for if a King of a foreign nation come into England, by the leave of the King of this realm (as it ought to be) in this case he shall sue and be sued by the name of a King; and herewith agreeth 11 E. 3. Tit. Br. (e) 473. where the case was, that Alice, which was the wife of R. de O. brought a writ of dower against John Earl of Richmond, and the writ was *Præcip. Johann' Comiti Richmondie custodi terr' et hæredis* of William the son of R. de O. the tenant pleaded that he is Duke of Britain, not named duke, judgment of the writ? But it is ruled that the writ was good; for that the dukedom of Britain was not within the realm of England. But there it is said, that if a man bring a writ against Edward (f) Baliol, and name him not King of Scotland, the writ shall abate for the cause aforesaid. And hereof there is a notable precedent in Fleta, lib. 2. cap. 3. sec. 9. where treating of the jurisdiction of the King's Court of Marshalsea it is said, *et hæc omnia ex officio suo licite facere poterit* (ss. *Seneschal' aul' hospitii Regis*) *non obstante alicujus libertate, etiam in alieno regno dum tamen reus in hospitio Regis poterit inveniri secundum quod contigit Paris. anno 14 Ed. 1. de Engelramo de Nogent capto in hospitio regis Angl' (ipso rege tunc apud Parisiam existente) cum discis argenti furatis recenter super facto, rege Franc' tunc presente, et unde licet curia regis Franc' de præd' latrone per castellanum Paris. petita fuerit, habitis hinc et inde tractatibus in consilio regis Franc', tandem consideratum fuit; quod Rex Angl' illa regia prærogativa, et hospitii sui privilegio uteretur,*

(g) *Vide* note (a) Countess of Rutland's case, Vol. III. p. 51.

et gauderet, qui, coram Roberto Fitz-John milite tunc hospitii regis Angl' Seneschallo de latrocinio convictus, per considerationem, ejus cur' fuit (a) suspensus in patibulo sancti Germani de pratis. Which proveth, that though the King be in a foreign kingdom, yet he is judged in law a King there. The other part of the said diversity is proved by the book-case in 20 (b) E. 4. fol. 6. a. b. where, in a writ of debt brought by Sir J. Douglas, Knight, against Elizabeth Molford, the defendant, demanded judgment of the writ; for that *the plaintiff was an earl of Scotland, (ii) but not of England; and that our Sovereign Lord the King had granted unto him safe conduct, not named by his name of dignity, judgment of the writ, &c. And there Justice Littleton giveth the rule: the plaintiff (saith he) is an earl in Scotland, but not in England; and if our Sovereign Lord the King grant to a duke of France a safe conduct to merchandize, and enter into his realm, if the duke cometh and bringeth merchandize into this land, and is to sue an action here, he ought not to name himself duke; for he is not a duke in this land, but only in France. And these be the very words of that book-case; out of which I collect three things. First, that the plaintiff was named by the name of a knight, where-soever he received that degree of dignity. *Vide (c)* 7 H. 6. 14 b. accord. 2. That an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm: and herewith agreeth the book of (d) 11 Ed. 3. the Earl of Richmond's case before recited. 3. That albeit the King by his letters patent of safe conduct do name him duke, yet that appellation maketh him no duke, to sue or to be sued by that name within England: so as the law in these points (apparent in our books) being observed and rightly understood, it appeareth how causeless their fear was that the adjudging of the plaintiff to be no alien should make a confusion of the nobilities of either kingdom.

Now are we in order come to the fourth noun (which is the fourth general part), *alienigena*; wherein six things did fall into consideration. 1. Who was *alienigena*, an alien born by the laws of England. 2. How many kinds of aliens born there were. 3. What incidents belonged to an alien born. 4. The reason why an alien is not capable of inheritance or freehold within England. 5. Examples, resolutions, or judgments reported in our books in all successions of ages, proving the plaintiff to be no alien. 6. Demonstrative conclusions upon the premises, approving the same.

1. An alien is a subject that is born out of the ligeance of the King, and under the ligeance of another; and can have no real or personal action for or concerning land: but in every such action the tenant or defendant may plead that he was born in

(a) Moor 798, 799.

(b) 9 Co. 117. b. Br. *nosme de dig* ity, 49.

[* 16 a.]

(c) Br. Brief 159. Fitz. Brief 35.

(d) 11 E. 3. Fitz. Brief. 473. Antea 15 b. Moor 803. 9 Co. 117 b.

The 4th general Part, *De alienigena*.

Who is an alien.

(ii) By the acts of Union, 5 Ann. c. 8, and 39 and 40 Geo. 3. c. 67. Peers of Scotland and Ireland shall enjoy all privileges of peers, as fully as the peers of Great Bri-

tain; the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and the right of sitting on the trial of peers, only excepted.

such a country which is not within ligeance of the King; and demand judgment if he shall be answered. And this is in effect the description which Littleton himself maketh, *lib. 2. cap. 14. Villen. fol. 43. Alienigena est alienæ gentis seu alienæ ligeantiæ, qui etiam *dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus est subditus, qui extra terram, i. e. potestatem Regis natus est.* And the usual and right pleading of an alien born doth lively and truly describe and express what he is. And therein two things are to be observed. 1. That the most usual and best pleading in this case, is, both exclusive and inclusive, viz. *extra ligeantiam domini Regis, &c. et infra ligeantiam alterius Regis*, as it appeareth in (a) 9 Ed. 4. 7. b. Book of Entries, fol. 244, &c. which cannot possibly be pleaded in this case, for two causes. 1. For that one King is Sovereign of both kingdoms. 2. One ligeance is due by both to one Sovereign; and in case of an alien there must of necessity be several Kings and several ligeances. Secondly, no pleading was ever *extra regnum*, or *extra legem*, which are circumscribed to place, but *extra ligeantiam*, which (as it hath been said) is not local or tied to any place.

It appeareth by Bracton, *lib. 3. tract. 2. c. 15. fol. 134.* that (b) Canutus the Danish King, having settled himself in this kingdom in peace, kept notwithstanding (for the better continuance thereof) great armies within this realm. The peers and nobles of England, distasting this government by arms and armies, *odimus accipitrem quia semper vixit in armis*, wisely and politically persuaded the King, that they would provide for the safety of him and his people, and yet his armies, carrying with them many inconveniencies, should be withdrawn: and therefore offered that they would consent to a law, that whosoever should kill an alien, and be apprehended, and could not acquit himself, he should be subject to justice: but if the manslayer fled, and could not be taken, then the town where the man was slain should forfeit sixty-six marks unto the King; and if the town were not able to pay it, then the hundred should forfeit and pay the same unto the King's treasure: whereunto the King assented. This law was penned *quicumque occiderit Francigenam, &c.*; not excluding other aliens, but putting *Francigena*, a Frenchman, for example, that others must be like unto him, in owing several ligeance to a several Sovereign, that is, to be *extra ligeantiam Regis Angl.*, and *infra ligeantiam alterius Regis*. And it appears before, out of Bracton and Fleta, that both of them use the same example (in describing of an alien) *ad fidem Regis Franciæ*. And it was holden, that except it could be proved that the party slain was an Englishman, that he should be taken for an alien: and this was called Englesherie, *Englesheria*, that is, a proof that the party slain was an Englishman. (Hereupon *Canutus presently withdrew his armies, and within a while after lost his crown, and the same was restored to his right owner.) The said law of Englesherie continued until 14 Ed. 3. cap. 4. and then the same was by act of Parliament ousted and abolished. So amongst the laws of William the First,

[* 16 b.]

4 Mod. 405.

8 T. R. 166.

(a) Antea 5 a.

(b) Stanf. Cor.
17. f.

Nota.

Full. Ch. Hist.
1. 1. 12.

[* 17 a.]

(published by Master Lambert, fol. 125.) *omnis Francigena* (there put for example as before is said, to express what manner of person *alienigena* should be) *qui tempore Edvardi propinquus nostri fuit particeps legum et consuetudinem Anglorum* (that is made denizen) *quod dicunt ad scot et lot persolvat secundum legem Anglorum.*

Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permixtus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the kings and princes in Christendom being now in league with our Sovereign: but a Scot being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or (a) goods personal whatsoever, as well as an Englishman, and may maintain any (b) action for the same: but (c) lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire, or get, nor maintain any action real or personal, for any land or house, unless the house be for their necessary habitation. For if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island. But if this alien become an enemy, (as all alien friends may) then is he utterly disabled to maintain any action, or get any thing within this realm. And this is to be understood of a temporary alien, that being an enemy may be a friend, or becoming a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui* (d) *inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no (a) peace; for as the Apostle saith, 2 Cor. 6. 15. *Quæ autem conventio Christi ad Belial, aut quæ pars fidei cum infidei*, and the law saith, *Judeo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere.* Register 282. *Infideles sunt Christi et Christianorum inimici.* And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all (1).

How many kind of aliens there be.

- (a) Co. Lit. 2 b.
- (b) 1 Bulst. 134. Yel. 198. Owen. 45. Co. Lit. 129. b. 1 And. 25. Moor 431. 1 Keb. 266. Cr. El. 142. 683. Cr. Car. 9. 4 Inst. 152. Dy. 2. pl. 8. O. Benl. 10. B. N. C. 375. Br. Non-ability 62.
- (c) Poph. 36. Co. Lit. 2 b. Dy. 2 pl. 8. 1 Saund. 5. 1 Bos. & Pull. 163.
- (d) Wing Maz. 10. Skin. 166.
- (a) 4 Inst. 155.

[* 17 b.]

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a conquest, &c. shall be governed. Dav. 30 b. 3 Keb. 402. Salk. 411, 412. 666. Comb. 55.

By what laws kingdoms gotten by conquest.

(1) The position in the text seems to have been a common error founded on a groundless opinion of Justice Brooke, Anon. 1 Salk.

46, and has long since been exploded, *Omi-chund v. Barker*, 1 Atk. 21. S. C. 1 Wils. 84, S. C. Willes's Rep. 538.

a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitæ et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain (κ). But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a king hath a kingdom by title of descent, there seeing by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws of himself, without consent of Parliament. Also if a King hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without Parliament. And in that case, while the realm of England, and that of Ireland were governed by several laws, any that was born in Ireland was no alien to the realm of England. In which precedent of Ireland three things are to be observed. 1. That then there had been two descents, one from Henry the Second to King Richard the First, and from Richard to King John, before the alteration of the laws. 2. That albeit Ireland was a distinct dominion, yet the title thereof being by conquest, the same by judgment of law might by express words be bound by act of the Parliament of England. 3. That albeit no *reservation were in King John's

Vaugh. 293.

Ireland.

[* 18 a.]

(κ) Memorandum 9th of August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon an appeal to the King in Council from the foreign plantations,—

1st. That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their law with them, and therefore such new found country is to be governed by the laws of England, though after such country is inhabited by the English, acts of Parliament made in England, without naming the foreign plantations, will not bind them; for which reason it has been determined that the statute of Frauds and Perjuries, which requires three witnesses, and that these should subscribe in the testator's presence in the case of a devise of a land, does not bind

Barbadoes: but that

2ndly. Where the King of England conquers a country, it is a different consideration; for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people, in consequence of which he may impose upon them what law he pleases: but

3dly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail. 2 Peere Williams, 75. *et vid. Collett v. Lord Keith*, 2 East 260. *Blankard v. Galdy*, 4 Mod. 225. S. C. 2 Salk. 411. *Attorney General v. Stewart*, 2 Meriv. 159.

charter, yet by judgment of law a writ of error did lie in the King's Bench in England of an erroneous judgment in the King's Bench of Ireland. Furthermore, in the case of a conquest of a Christian kingdom, as well those that served in wars at the conquest as those that remained at home for the safety and peace of their country, and other the King's subjects, as well *antenati* as *postnati*, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England.

Kelw. 202. pl.
19. 4 Inst. 71.
F. N. B. 22 d.

Vaugh. 290,
291.

The third kind of enemy is, *inimicus permissus*, an enemy that cometh into the realm by the King's safe conduct, of which you may read in the Register, fol. 25. Book of Entries, *Ejectione firmæ*, 7, 32 H. 6. 23 b. &c. Now what a subject born is, appeareth at large by that which hath been said *de ligeantia*: and so likewise *de subdito dato*, of a *donation*: for that is the right name, so called, because his legitimation is given unto him; for if you derive denizen from *deins nec*, one born within the obedience or ligeance of the King, then such a one should be all one with a natural-born subject. And it appeareth before out of the laws of King W. 1. of what antiquity the making of denizens by the King of England hath been.

Co. Lit. 229 a.

3. There be regularly (unless it be in special cases) three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other. For the first, it is termed actual obedience, because, though the King of England hath absolute right to other kingdoms or dominions, as France, Aquitaine, Normandy, &c. yet seeing the King is not in actual possession thereof, none born there since the crown of England was out of actual possession thereof, are subjects to the King of England. 2. The place is observable, but so as many times ligeance or obedience without any place within the King's dominions may make a subject born, but any place within the King's dominions may make a subject born, but any place within the King's dominions without obedience can never produce a natural subject. And therefore if any of the King's Ambassadors in foreign nations, have children there of their wives, being English women, by the common laws of England they are natural-born subjects, and yet they are born out of the King's dominions. But if enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience. But the time of his (a) birth is of the essence of a subject born; for he cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the King. And that is

Of the incidents to an
Lit. Rep. 27.
Vin. Ab. Alien
A. 2.

Cr. Car. 601,
602. March 91.
Jenk. Cent. 3.

[* 18 b.]

(a) 2 Vent. 6.
Vaugh. 286.

the reason that *antenati* in Scotland (for that at the time of their birth they were under the ligeance and obedience, of another King) are aliens born, in respect of the time of their birth.

Wherefore an alien born is not capable of lands.
O. Bridgm. 431.

See 2 H. 4. c. 7.
& c. 9.

(a) 10 Co. 104
a. Co. Lit. 156
Poph 36.

Examples and authorities in law.

(b) Co. Lit. 10
a. 191 a 232 a.

[* 19 a.]

Co. Litt. 97 b.

4. It followeth next in course to set down the reasons, wherefore an alien born is not capable of inheritance within England, and that he is not for three reasons. 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war, and ornament of peace,) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. Which three reasons do appear in the statute of 2 H. 5 cap. and 4 H. 5. cap. *ultimo*. But it may be demanded, wherein doth that destruction consist; whereunto it is answered; first, it tends to destruction *tempore belli*; for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's Second Book of his *Æneid*, where a very few men in the heart of the city did more mischief in a few hours, than ten thousand men without the walls in ten years. Secondly, *tempore pacis*, for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice (the supporter of the commonwealth) for that aliens born cannot be returned of juries (a) for the trial of issues between the King and the subject, or between subject and subject. And for this purpose, and many other, (see a charter worthy of observation) of King Ed. 3. written to Pope Clement, *datum apud Westm' 26. die Sept. ann. regni nostri Franciæ 4 regni vero Angliæ 17.*

5. Now are we come to the examples, resolutions, and judgments of former times; wherein two things are to be observed, first, how many cases in our books do over-rule this case in question (for *ubi (b) eadem ratio ibi idem jus, et de similibus idem est iudicium*. 2. That for want of an express text of law in *terminis terminantibus* and of examples and precedents in like cases (as was objected by some) we are driven to determine the question by natural reason: for it was said, *si cesset lex scripta id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit, recurrendum est ad rationem*. But that receiveth a threefold answer:—First, That there is no such rule in the common or civil law: but the true rule of the civil law is, *lex scripta si cesset, id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit, tunc id quod proximum et consequens ei est, et si id non appareat, tunc jus quo urbs Romana utitur, servari oportet*. Secondly, If the said imaginative rule be rightly and legally understood, it may stand for truth: for if you intend *ratio* for the legal and profound reason of such as by diligent study and long experience and observation are so learned in the laws of this realm, as out of the reason of the same they can rule the case in question, in that sense the said rule is true: but if it be intended of the reason of the wisest man that professeth not the laws

of England, then (I say) the rule is absurd and dangerous ; for (a) *cuilibet in sua arte perito est credendum et quod quisque (b) norit in hoc se exerceat. Et omnes prudentes illa admittere solent quæ probantur iis qui in sua arte bene versati sunt, Arist.*

1. *Topicorum*, cap. 6. Thirdly, There be multitudes of examples, precedents, judgments, and resolutions in the laws of England, the true and unstrained reason whereof doth decide this question ; for example the dukedom of Aquitaine, whereof Gascoign was parcel, and the earldom of Poitiers, came to King Henry the second by the marriage of Eleanor, daughter and heir of William duke of Aquitaine, and Earl of Poitiers, which descended to Rich. 1., Hen. 3., Ed. 1., Ed. 2., Ed. 3., &c. In 27 lib. (c) Ass. pl. 48. in one case there appear two judgments and one resolution to be given by the Judges of both benches in this case following. The possessions of the Prior of Chelsey in the time of war were seised into the King's hands, for that the Prior was an alien born : the Prior by petition of right sued to the King, and the effect of his petition was, that before he came prior of Chelsey, he was Prior of Andover, and whilst he was Prior there, his possessions of that priory were likewise seised for the same cause supposing that he was an alien born ; whereupon he sued a former petition, and alleged that he was born in Gascoign within the ligeance of the King : which point being put in issue and found by jury to be true, it was adjudged that he should have restitution of his possessions generally without mentioning of advowsons. After which restitution, one of the said advowsons became void, the Prior presented, against whom the King brought a *Quare impedit*, wherein the King was barred ; and all this was contained in the latter petition. And the book saith, that the Earl of Arundel, and Sir Guy of B. came into the Court of Common Pleas, and demanded the opinion of the Judges of that Court concerning the said case, who resolved, that upon the matter aforesaid the King had no right to seize. In which case, amongst many notable points, this one appeareth to be adjudged and resolved, that a man born in Gascoign under the King's ligeance, was no alien born, as to lands and possessions within the realm of England, and yet England and Gascoign were several and distinct countries.

2. Inherited by several and distinct titles. 3. Governed by several and distinct municipal laws, as it appeareth amongst the records in the Tower, Rot. Vasc. 10. Ed. 1. Num. 7. 4. Out of the extent of the Great Seal of England, and the jurisdiction of the Chancery of England. 5. The like objection might be made for default of trial, as hath been made against the plaintiff. And where it was said that Gascoign was no kingdom, and therefore it was not to be matched to the case in hand, it was answered, that this difference was without a diversity as to the case in question ; for if the plea in the case at the bar be good, then without question the Prior had been an alien ; for it might have been said (as it is in the case at the bar) that he was born *extra ligeantiam Regis regni sui Angliæ, et infra ligeantiam domini sui Vasconia*, and that they

(a) 4 Co. 29a.

5 Co. 7 a.

Caudry's case.

Cawly 31. Co.

Lit. 125 a.

(b) 11 Co. 10 b.

12 Co. 66. 13

Co. 12. Co.

Lit. 125 a.

8 Co. 130 a.

Gascoign, Vas-

conia, Gasco-

nia.

(c) Moor 796.

801. Post. 20 b.

[* 19 b.]

Vasconia appellata fuit, tempore Caroli magni regnum de Vasconia.
Mo. 800.
Vaugh. 300.

Co. Lit. 7. b.

[* 20 a.]

(a) Vaugh. 290.
9 Co. 31 b.
2 Roll. 583.
Co. Lit. 74 a.
Br. Trial 126.

Vaugh. 401. 2
Inst. 486.
Moor. 864.

3 Inst. 179.

Ant., fol. 8 b.

were several dominions, and governed by several laws: but then such a conceit was not hatched. that a King having several dominions should have several ligeances of his subjects. Secondly, it was answered, that Gascoin was sometime a kingdom, and likewise Millan, Burgundy, Bavaria, Bretagne, and others were, and now are become, Dukedoms. Castile, Aragon, Portugal, Barcelona, &c. were sometime earldoms, afterwards dukedoms, and now kingdoms. Bohemia and Poland were sometime dukedoms, and now kingdoms; and (omitting many other, and coming nearer home,) Ireland was before 32 H. 8. a lordship; and now is a kingdom, and yet the King of England was as absolute a Prince and Sovereign when he was lord of Ireland, as now when he is styled King of the same. 10 Ed. 3. 41. an exchange was made between an Englishman and a Gascoin, of lands in England and in Gascoin; *ergo*, the Gascoin was no alien, for then had he not been capable of lands in England, 1 H. 4. 1. the King brought a writ of right of ward against one Sybil, whose husband was exiled into Gascoin; **ergo* Gascoin is no parcel or member of England, for *exilium est patrie privatio, natalis soli mutatio, legum nativarum amissio*; 4 E. 3. 10 b. the King directed his writ out of Chancery under the Great Seal of England, to the Mayor of (a) Burdeaux. (a city in Gascoin) then being under the King's obedience, to certify, whether one that was outlawed here in England. was at that time in the King's service under him *in obsequio Regis*: whereby it appeareth that the King's writ did run into Gascoin, for it is the trial that the common law hath appointed in that case. But as to other cases, it is to be understood, that there be two kinds of writs *Brevia mandatoria et remedialia, et brevia mandatoria et non remedialia: brevia mandatoria et remedialia*, as writs of right, of *Formedon*, &c. of debt, trespass, &c. and shortly all writs real and personal, whereby the party wronged is to recover somewhat, and to be remedied for that wrong was offered unto him, are returnable or determinable in some court of justice within England, and to be served and executed by the sheriffs, or other ministers of justice within England, and these cannot by any means extend into any other kingdom, country, or nation, though that it be under the King's actual ligeance and obedience. But the other kind of writs that are mandatory, and not remedial, are not tied to any place, but do follow subjection and ligeance, in what country or nation soever the subject is, as the King's writ to command any of his subjects residing in any foreign country to return into any of the King's own dominions, *sub fide et ligeantia quibus nobis tenemur*. And so are the aforesaid mandatory writs cited out of the *Register* of protection for safety of body and goods, and requiring that if any injury be offered, that the same be redressed according to the laws and customs of that place. *Vide le Reg.* fol. 26. Stamford *Prærog.* cap. 12. fol. 39. saith, that men born in Gascoin are inheritable to lands in England. This doth also appear by divers acts of parliament: for by the whole parliament, 39 E. 3. cap. 16. it is agreed, that the Gascoins are

of the ligeance and subjection of the King. *Vide* 42 Ed. 3. cap. 2. and 28 H. 6. cap. 5. &c.

Guiennewas another part of Aquitain, and came by the same title; and those of Guienne were by act of parliament in 13 H. 4. not imprinted, *ex Rot. Parliament. eodem anno*, adjudged and declared to be no aliens, but able to possess and purchase, &c. lands within this realm. And so doth Stamford take the law. *Prærog. c. 12. f. 39.* *And thus much of the dukedom of Aquitain, which (together with the earldom of Poitiers) came to King Henry the Second (as hath been said) by marriage, and continued in the actual possession of the Kings of England by ten descents, *viz.* from the first year of King Henry the Second, unto the two and thirtieth year of King Henry the Sixth, which was upon the very point of three hundred years, within which duchy there were (as some write) four archbishoprics, 24 bishoprics, 15 earldoms, 202 baronies, and above a thousand captainships and bailiwicks; and in all this long time neither book case nor record can be found wherein any plea was offered to disable any of them that were born there, by foreign birth, but the contrary hereof directly appeareth by the said book case of (a) 27 lib. Ass. 48.

The Kings of England had sometimes Normandy under actual ligeance and obedience. The question is then, whether men born in Normandy, after one King had them both, were inheritable to lands in England; and it is evident by our books that they were: for so it appeareth by the declaratory act of 17 Ed. 2. *de Prærog. Reg. c. 12.* that they were inheritable to, and capable of lands in England; for the purview of that statute is *quod Rex habebit escaetas de terris Normannorum, &c. Ergo* Normans might have lands in England, *et hoc similiter intelligendum est, si aliqua hæreditas descendat alicui nato in partibus transmarinis, &c.* Whereby it appeareth, that they were capable of lands within England by descent. And that this act of 17 E. 2. was but a declaration of the common law, it appeareth both by Bracton who (as it hath been said) wrote in the reign of Henry the third, lib. 3. tract. 2. c. 1. f. 116. and by Britton who wrote in 5 E. 1. c. 18. that all such lands as any Norman had either by descent or purchase, escheated to the King for their treason, in revolting from their natural liege lord and sovereign. And therefore Stamford *Prærog. cap. 12. fol. 39.* expounding the said statute of 17 E. 2. cap. 12. concludeth, that by that chapter it should appear (as if he had said, it is apparent without question) that all men born in Normandy, Gascoin, Guienne, Anjou, and Britain, (whilst they were under actual obedience) were inheritable within this realm as well as Englishmen. And the reason thereof was, for that they were one ligeance due to one Sovereign. And so much (omitting many other authorities) for Normandy: saving I cannot let pass the isles of Guernsey and Jersey, parts and parcels of the dukedom of Normandy, yet remaining under the actual ligeance and obedience of the King, I think no man will doubt, but those that are *born

Guyan.
Guienne.
13 H. 4. nu. 22
Cotton's Abr.
480.

[* 20 b.]

(a) Dav. 19 a.
Moor 796. 801.
Normandy.
Normannia.
Normandia.

Stamf. *Prærog.*
36, 39, &c.

Kel. 202. pl. 19.
4 Inst. 286.
Co. Lit. 11 b.
Seld. Mare
Clau. lib. 2.
cap. 19. Guernsey and Jersey.

[* 21 a.]

Co. Lit. 11 b.

4 Inst. 286.

Co. Lit. 7 a.

Man, Mannia.
4 Inst. 283, 284.
Co. Lit. 11 b.
Kelw. 202. pl.
19.
2 And. 155, 156

[* 21 b.]

in Guernsey and Jersey (though those isles are no parcel of the realm of England, but several dominions enjoyed by several titles, governed by several laws) are inheritable, and capable of any lands within the realm of England, 1 E. 3. fol. 7. Commission to determine the title of lands within the said isles, according to the laws of the isles; and Mich. 41 E. 3. in the treasury, *Quia negotium præd' nec aliqua alia negotia de insulâ præd' emergentia non debent terminari nisi secundum legem insulæ præd', &c.* And the Register fol. 22. *Rex fidelibus suis de Jernsey et Gersey.* King William the First brought this dukedom of Normandy with him, which by five descents continued under the actual obedience of the Kings of England; and in or about the 6th year of King John, the crown of England lost the actual possession thereof, until King Henry the Fifth recovered it again, and left it to King Henry the Sixth, who lost it in the 28th of his reign; wherein were (as some write) one archbishopric and six bishoprics, and an hundred strong towns and fortresses, besides those that were wasted in war. Maud the Empress, the only daughter and heir of Henry the First, took to her second husband Jeffrey Plantagenet, Earl of Anjou, Tourain, and Mayne, who had issue King H. 2. to whom the said Earldom by just title descended, who, and the Kings that succeeded him, stiled themselves by the name of *Comes Andegav'*, &c. until King E. 3. became King of all France; and such as were born within that earldom, so long as it was under the actual obedience of the King of England, were no aliens, but natural-born subjects; and never any offer made, that we can find, to disable them for foreign birth. But leave we Normandy and Anjou, and speak we of the little, but yet ancient and absolute kingdom of the Isle of Man, as it appeareth by diverse ancient and authentic records; as taking one for many. Artold King of Man sued to King H. 3. to come into England to confer with him, and to perform certain things which were due to King H. 3. Thereupon King H. 3. 21 Decemb. ann. regn. sui 34, at Winchester, by his letters patent gave licence to Artold King of Man, as followeth: *Rex omnibus salutem. Sciatis, quod licentiam dedimus, &c. Artoldo Regi de Man veniendo ad nos in Angl', ad loquend' nobisc' et ad faciend' nobis quod facere debet; et ideo vobis mandamus quod ei Regi in veniendo ad nos in Angl', vel ibi morando, vel inde redeundo nullum faciat' aut fieri permittatis damnum, injur', molestiam, aut gravamen, vel etiam hominib' suis quos secum ducet et si aliquid eis forisfact' fuerit, id eis sine dilat' faciat' emendari. In cujus, &c. duratur usque ad fest' S. Mich.* Wherein *two things are to be observed; 1. That seeing that Artold King of Man sued for a licence in this case to the King, it proveth him an absolute King; for that a Monarch or an absolute Prince cannot come into England without licence of the King, but any subject being in league, may come into this realm without licence. 2. That the King in his licence doth style him by the name of a King. It was resolved in 11 H. 8. that where an office was found after the decease of Thomas Earl of Derby, and that he died seised, &c.

of the Isle of Man, that the said office was utterly void †, for that the Isle of Man, Normandy, Gascoin, &c. were out of the power of the Chancery, and governed by several laws; and yet none will doubt, but those that are born within that isle are capable and inheritable of lands within the realm of England. Wales was some time a kingdom, as it appeareth by 19 H. 6. fol. 6. and by the act of Parliament of 2 H. 5. c. 6. but whilst it was a kingdom, the same was holden, and within the fee, of the King of England; and this appeareth by our books, Fleta, lib. 1. cap. 16. 1 E. 3. 14. 8 E. 3. 59. 13 E. 3. tit. Jurisdict'. 10 H. 4. 6. Plow. Com. 368. And in this respect in divers ancient charters, Kings of old time styled themselves in several manners, as King Edgar, *Britannia* Βασιλεως; *Etheldredus, totius Albion' Dei providentiâ Imperator*; *Edredus Magn' Britann' Monarcha*, which among many other of like nature I have seen. But by the statute of 12 E. 1. Wales was united and incorporated into England, and parcel of England in possession; and therefore it is ruled in 7 H. 4. f. 13. a. that no protection doth lie *quia moratur in Wallia*, because Wales is within the realm of England. And where it is recited in the act of 27 H. 8. that Wales was ever parcel of the realm of England, it is true in this sense, viz. that before 12 E. 1. it was parcel in tenure, and since it is parcel of the body of the realm. And whosoever is born within the fee of the King of England, though it be in another kingdom, is a natural-born subject, and capable and inheritable of lands in England, as it appeareth in Plow. Com. 126. And therefore those that were born in Wales before 12 E. 1. whilst it was only holden of England, were capable and inheritable of lands in England.

Now come we to France and the members thereof, as Callice, Guynes, Tournay, &c. which descended to King Edward the Third, as son and heir to Isabel, daughter and heir to Philip le Beau, King of France. Certain it is, whilst *King Henry the Sixth had both England and the heart and greatest part of France under his actual ligeance and obedience (for he was crowned King of France in Paris), that they that were then born in those parts of France, that were under actual ligeance and obedience, were no aliens, but capable of and inheritable to lands in England. And that is proved by the writs in the Register, fol. 26. cited before. But in the inrolment of letters patent of denization in the Exchequer *int' originalia*, ann. 11 H. 6. with the Lord Treasurer's Remembrancer was strongly urged and objected; for (it was said) thereby it appeareth, that King H. 6. *in anno* 11 of his reign, did make denizen one Reynel born in France; whereunto it was answered, that it is proved by the said letters patent, that he was born in France before King Henry the Sixth had the actual possession of the crown of France, so as he was *antenuatus*; and this appeareth by the said letters patent, whereby the King granteth, that *Magister Johannes Reynel serviens noster, &c. infra regnum nostrum Franc' oriundus pro termino vitæ suæ sit ligeus noster, et eodem modo teneatur sicut verus et fidelis noster infra regnum Angl' oriundus, ac quod ipse terras*

+ Acc. Keilw. 202.

Wales, Cambria, Wallia. 3 Keb. 402. 4 Inst. 239, 240. &c. Plow. 126 b. 129. Vaugh. 281.

Co. Lit. 130 b. Fitz. Protect. 23. Br. Protect. 33. 3 Keb. 405. Vaugh. 414.

France, Gallia, Francia.

[* 22 a.]

infra regnum nostrum Angl' seu alia dominia nostra perquirere possit et valeat. Now if that Reynel had been born since Henry the Sixth had the quiet possession of France (the King being crowned King of France about one year before), of necessity he must be an infant of very tender age, and then the King would never have called him his servant, nor made the patent (as thereby may be collected) for his service, nor have called him by the name of *Magister Johannes Reynel*: but without question he was *ant-natus*, born before the King had the actual and real possession of that crown.

Calais is a part of the kingdom of France, and never was parcel of the kingdom of England, and the Kings of England enjoyed Calais in and from the reign of King Edward the Third, until the loss thereof in Queen Mary's time, by the same title that they had to France. And it is evident by our books, that those that were born in Calais were capable and inheritable to lands in England, 42 E. 3. c. 10. *Vide* 21 H. 7. 33 b. 19 H. 6. 2 E. 4. 1 a. b. 39 H. 6. 39 a. 21 E. 4. 18 a. 28 H. 6. 3 b. By all which it is manifest, that Calais being parcel of France was under the actual obedience and commandment of the King, and by consequent those that were born there, were natural-born subjects, and no aliens. Calais from the reign of King Edward 3. until the fifth year of Queen Mary, remained under the actual obedience of the King of England. *Guines also, another part of France, was under the like obedience to King Henry the Sixth, as appeareth by 31 H. 6. fol. 4. And Tournay was under the obedience of Henry the Eighth, as it appeareth by 5 El. Dyer, fol. 224.; for there it is resolved, that a bastard born at Tournay, whilst it was under the obedience of Henry the Eighth, was a natural subject, as an issue born within this realm by aliens. If then those that were born at Tournay, Calais, &c. whilst they were under the obedience of the King, were natural subjects, and no aliens, it followeth, that when the kingdom of France (whereof those were parcels) was under the King's obedience, that those that were then born there were natural subjects, and no aliens.

Next followeth Ireland, which originally came to the Kings of England by conquest: but who was the first conqueror thereof, hath been a question. I have seen a charter made by King Edgar in these words: *Ego Edgarus Anglorum Βασιλεως, omniumque insularum oceani, quæ Britanniam circumjacent, Imperator et Dominus, gratias ago ipsi Deo omnipotenti Regi meo, qui meum imperium ampliavit et exaltavit super regnum patrum meorum, &c. mihi concessit propitia divinitas, cum Anglorum Imperio omnia regna insularum oceani, et cum suis ferocissimis Regibus usque Norvegiam, maximamque partem Hibern', cum sua nobilissimâ civitate de Dublin', Anglorum Regno subjugare, quapropter et ego Christi gloriam et laudem in regno meo exallare, et ejus servitium amplificare devotus disposui, &c.* Yet for that it was wholly conquered in the reign of Henry the Second, the honour of the conquest of Ireland is attributed to him, and his style was, *Rex Angl', Dominus Hibern', Dux Normann' Dux Aquitan' et Comes Andegav'*, King of England,

Calice, Calicia, Caletum. Kelw. 202. pl. 19. 2 And. 116. Br. Trial 58, 133. Br. Error 101. Br. Cinque Ports 10. Vaugh. 401. 4 Inst. 282.

[* 22 b.]

Fitz. Protect. 13. Guynes. Tournay. Dy. 224. pl. 29. Vaugh. 282. Co. Lit. 8 a.

Ireland, Hibernia. 12 Co. 108, 109. &c. 4 Inst. 349, 350, &c. Dav. 60. Præf. 4. Rep. 32, 33. 2 Ventr. 4.

Co. Lit. 7 a.

Lord of Ireland, Duke of Normandy, Duke of Aquitain, and Earl of Anjou. That Ireland is a dominion separate and divided from England, it is evident from our books, 20 H. 6. 8. Sir John Pilkington's case. 32 H. 6. 25. 20 Eliz. Dyer 360. Plow. Com. 360. And 2 R. 3. 12. a. *Hibernia habet Parliamentum, et faciunt leges, et nostra statuta non ligant eos, quia non mittunt milites ad Parliamentum* (which is to be understood, unless they be especially named) *sed personæ eorum sunt subiecti Regis, sicut inhabitantes in Culesid, Gasconid, et Guyan.* Wherein it is to be observed, that the Irishman (as to his subjection) is compared to men born in Calais, Gascoin, and Guienne. Concerning their laws, *ex rotulis potentium de anno 11 Regis H. 3.* there is a charter which that King made, beginning in these words, *Rex, &c. Baronibus, militibus, et omnibus libere tenentibus I. salutem, satis ut credimus vestra auditio discretio, quod quando bonæ memoriæ (a) Johannes quondam Rex Angl' pater noster venit in Hiberniam ipse duxit secum viros discretos et legis peritos, quorum communi consilio et ad instantiam Hibernensium statuit et precepit leges Anglicanas in Hibern' ita quod leges easdem in scripturas reductas reliquit sub sigillo suo ad Scaccarium Dublin'.* So as now the laws of England became the proper laws of Ireland; and therefore, because they have Parliaments holden there, whereat they have made divers particular laws concerning that dominion, as it appeareth in 20 H. 6. 8. & 20 El. (b) Dyer 360. and for that they retain unto this day divers of their ancient customs, the book in 20 H. 6. 8. holdeth, that Ireland is governed by laws and customs, separate and diverse from the laws of England. A voyage royal may be made into Ireland. *Vide (c) 11 H. 4. 7. a. & 7 (d) E. 4. 27. a.* which proveth it a distinct dominion. And in anno 33 Reg. El. it was resolved by all the Judges of England in the case of (e) O'Rurke an Irishman, who had committed high treason in Ireland, that he, by the statute of 23 H. 8. c. 33. might be indicted, arraigned, and tried for the same in England, according to the purview of that statute: the words of which statute be, "That all treasons, &c. committed by any (f) person out of the realm of England shall be from henceforth enquired of, &c." and they all resolved (as afterward they did also in Sir John Perrot's case) that Ireland was out of the realm of England, and that treasons committed there were to be tried within England by that statute. In the statute of 4 Hen. 7. cap. 24. of (g) Fines, provision is made for them that be out of this land; and it is holden in Plow. Com. in Stowel's case 375, that he that is in Ireland is out of this land, and consequently within that proviso. Might not then the like plea be devised as well against any person born in Ireland, as (this is against Calvin that is a *postnatus*) in Scotland? For the Irishman is born *extra ligeantiam Regis regni sui Angl', &c.* which be *verba operativa* in the plea: but all men know that they are natural-born subjects, and capable of and inheritable to lands in England. Lastly, to conclude this part with (h) Scotland itself: in an-

12 Co. 111.
4 Inst. 351.
1 And. 263.
2 And. 116.
Dav. 37 a.
Jenk. Cent. 164.
Br. Parliam. 98.
Vin. Ab. Irel-
land (A).
Co. Lit. 141 a.

[* 23 a.]
(a) Co. Lit. 141.
b. 2 Vent. 4.

(b) 9 Co. 117 b.
Cart. 186.

(c) Fitz. Protect. 24. Br. Protect. 34.
(d) Fitz. Protect. 16. Br. Protect. 72.
3 Inst. 11, 18, 24. Co. Lit. 261. b. 1 And. 262, 263.
2 Vent. 4.
Cart. 190.
Cawly 93.
(f) 35 H. 8. c. 2.

(g) Cawly 93.
Co. Lit. 261 b.
3 Inst. 11.

(h) 3 Inst. 18.
Plowd. 368. b. Scotland, Scotia.

(i) Heylin's
Cosmog. lib. 4.
p. 305, 306.
(k) Fitz. Brief.
551.

cient time part of (i) Scotland (besides Berwick) was within the power and ligeance of the King of England, as appeareth by our books (k) 42 E. 3. 2. b. the Lord Beaumont's case, 11 E. 3. c. 2, &c. and by precedents hereafter mentioned; and that part (though it were under the King of England's ligeance and obedience) yet was it governed by the laws of Scotland. *Ex rotulis Scotiæ, anno 11 Ed. 3.* amongst the records in the Tower of London. *Rex, &c. Constituimus Rich. Talebot Justiciarium nostrum villæ Berwici super Twedam, ac omnium aliarum terrarum nostrarum in partibus Scot', ad faciend' omnia et singula quæ ad officium Justiciarii pertinent, secundum legem et consuetudinem regni Scot'.* And after anno 26 E. 3. *ex eodem rot. Rex Henrico de Percey, Ricarda de Nevil, &c. Volumus et vobis et alteri vestrum tenore præsentium committimus et mandamus, quod homines nostri de Scot' ad pacem et obedientiam nostram existentes, legibus, libertatibus, et liberis consuetudinibus, quibus ipsi et antecessores sui tempore celebris memoriæ Alexandri quondam Regis Scot' rationabiliter usi fuerunt, uti ut gaudere deberent, prout in quibusdam indenturis, &c. plenius dicitur contineri.* And there is a writ in the Register 295. a. *Dedimus potestatem recipendi ad fidem et pacem nostram homines de Galloway.* Now the case in (a) 42

(a) Fitz. Brief.
551. Ant. 23. a.

Ed. 3. 2. b. (which was within sixteen years of the said grant, concerning the laws in 26 E. 3.) ruleth it, that so many as were born in that part of Scotland that was under the ligeance of the King were no aliens, but inheritable to lands in England; yet was that part of Scotland in another kingdom, governed by several laws, &c. And if they were natural subjects in that case, when the King of England had but part of Scotland, what reason should there be why those that are born there, when the King hath all Scotland, should not be natural subjects, and no aliens? So, likewise, (b) Berwick is no part of England, nor governed by the laws of England; and yet they that have been born there, since they were under the obedience of one King, are natural-born subjects, and no aliens, as it appeareth in 15 R. 2. cap. 7, &c. *Vide (c)* 19 H. 6. 35. b. & 39 H. 6. 39. a. And yet in all these cases and examples, if this new devised plea had been sufficient, they should have been all aliens, against so many judgments, resolutions, authorities, and judicial precedents in all successions of ages. There were sometimes in England, whilst the heptarchy lasted, seven several crowned Kings of seven several and distinct kingdoms; but in the end the West Saxons got the monarchy, and all the other Kings melted (as it were) the crowns to make one imperial diadem for the King of the West Saxons over all. Now when the whole was under the actual and real ligeance and obedience of one King, were any that were born in any of those several and distinct kingdoms aliens one to another? Certainly they being born under the obedience of one King and Sovereign were all natural-born subjects, and capable of and inheritable unto any lands in any of the said kingdoms.

Berwick.
(b) 1 Sid. 381,
382.
2 Burro. 858.

(c) Fitz. Protect. 8. Br. Protect. 49.

[* 24 a.]

*In the holy history reported by St. Luke, *ex dictamine Spi-*

ritus Sancti, cap. 21 et 22 Act. Apostolorum, it is certain that St. Paul was a Jew, born in Tarsus, a famous city of Cilicia; for it appeareth in the said 21st chapter, ver. 39. by his own words, *Ego homo sum quidem Judæus a Tarso Ciliciæ, non ignotæ civitatis municeps*. And in the 22d chapter, ver. 3. *Ego sum vir Judæus natus Tarso Ciliciæ, &c.*; and then made that excellent sermon there recorded, which, when the Jews heard, the text saith, ver. 22. *Levaverunt vocem suam dicentes, Tolle de terra hujusmodi, non enim fas est eum vivere; vociferantibus autem eis et projicientibus vestimenta sua, et pulverem jactantibus in aerem*, Claudius Lysias, the popular Tribune, to please this turbulent and profane multitude (though it were utterly against justice and common reason) the text saith *Jussit Tribunus induci eum in castra; 2. flagellis cædi, and 3. torqueri eum (quid ita?) ut sciret propter quam causam sic acclamarent;* and when they had bound Paul with cords, ready to execute the tribune's unjust commandment, the blessed Apostle (to avoid unlawful and sharp punishment) took hold of the law of a heathen emperor, and said to the Centurion standing by him, *Si hominem Romanum et indemnatum licet vobis flagellare?* Which when the Centurion heard, he went to the Tribune and said, *Quid acturus es? Hic enim homo civis Romanus est*. Then came the Tribune to Paul, and said unto him, *Dic mihi si tu Romanus es? At ille dixit, Etiam*. And the Tribune answered, *Ego multa summa civitatem hanc consequutus sum*. But Paul, not meaning to conceal the dignity of his birth-right, said, *Ego autem et natus sum*: as if he should have said to the Tribune, you have your freedom by purchase of money, and I (by a more noble means) by birth-right and inheritance. *Protinus ergo* (saith the text) *decesserunt ab illo qui illum torturi erant, Tribunus quoque timuit postquam rescivit, quia civis Romanus esset, et quia alligasset eum*. So as hereby it is manifest that Paul was a Jew, born at Tarsus in Cilicia, in Asia Minor; and yet being born under the obedience of the Roman Emperor, he was by birth a citizen of Rome in Italy in Europe, that is, capable of and inheritable to all privileges and immunities of that city. But such a plea as is now imagined against Calvin might have made St. Paul an alien to Rome. For if the Emperor of Rome had several ligeances for every several kingdom and country under his obedience, then might it have been said against St. Paul, that he was *extra *ligeantiam Imperatoris regni sui Italiæ, et infra ligeantiam Imperatoris regni sui Ciliciæ, &c.* But as St. Paul was *Judæus patriæ et Romanus privilegio, Judæus natione et Romanus jure nationum*; so may Calvin say, that he is *Scotus patriæ, et Anglus privilegio; Scotus natione, et Anglus jure nationum*.

Samaria in Syria was the chief city of the ten tribes: but it being usurped by the King of Syria, and the Jews taken prisoners, and carried away in captivity, was after inhabited by the Panyms. Now albeit Samaria of right belonged to Jewry, yet because the people of Samaria were not under actual obedience, by the judgment of the Chief Justice of the whole world they were adjudged *alienigenæ*, aliens: for in the

[* 24 b.]

Evangelist St. Luke, c. 17. when Christ had cleansed the ten lepers, *unus autem ex illis* (saith the text) *ut vidit quia mundatus esset, regressus est cum magnâ voce magnificans Deum, et cecidit in faciem ante pedes ejus gratias agens, et hic erat Samaritanus. Et Jesus respondens dixit, Nonne decem mundati sunt, et novem ubi sunt? Non est inventus qui rediret et daret gloriam Deo nisi hic alienigena.* So as, by his judgment, this Samaritan was *alienigena*, a stranger born; because he had the place, but wanted obedience. *Et si desit obedientia non adjuvet locus.* And this agreeth with the divine, who saith, *Si locus salvare potuisset, Satan de cælo pro sua inobedientia non cecidisset. Adam in paradiso non cecidisset, Lot in monte non cecidisset, sed potius in Sodom.*

6. Now resteth the sixth part of this division, that is to say, six demonstrative illations or conclusions, drawn plainly and expressly from the premises.

1. Every one that is an alien by birth, may be, or might have been, an enemy by accident: but Calvin could never at any time be an enemy by any accident; *ergo*, he cannot be an alien by birth. *Vide* 33 H. 6. f. 1. a. b. the difference between an alien enemy, and a subject traitor. *Hostes sunt qui nobis, vel quibus nos bellum decernimus, cæteri proditores, prædones, &c.* The major is apparent, and is proved by that which hath been said. *Et vide Magna Charta*, cap. 50. 19 E. 4. 6. 9 E. 3. c. 1. 27 E. 3. c. 2. 4 H. 5. c. 7. 14 E. 3. stat. 2. c. 2. &c.

2. Whosoever are born under one natural ligeance and obedience due by the law of nature to one Sovereign are natural-born subjects: but Calvin was born under one natural ligeance and obedience, due by the law of nature to one Sovereign; *ergo*, he is a natural-born subject.

[* 25 a.]

3. Whosoever is born within the King's power or protection, is no alien: but Calvin was born under the King's power and protection; *ergo* he is no alien.

4. Every stranger born must at his birth be either *amicus* or *inimicus*: but Calvin at his birth could neither be *amicus* nor *inimicus*; *ergo* he is no stranger born. *Inimicus* he cannot be, because he is *subditus*: for that cause also he cannot be *amicus*; neither now can *Scotia* be said to be *solum amici*, as hath been said.

Sawyer's Argument in Quo warranto 25. Hob. 87. 1 Black. 42. 57.

5. Whatsoever is due by the law or constitution of man, may be altered: but natural ligeance or obedience of the subject to the Sovereign cannot be altered; *ergo* natural ligeance or obedience to the Sovereign is not due by the law or constitution of man. Again, whatsoever is due by the law of nature, cannot be altered: but ligeance and obedience of the subject to the Sovereign is due by the law of nature; *ergo* it cannot be altered. It hath been proved before, that ligeance or obedience of the inferior to the superior, of the subject to the sovereign, was due by the law of nature many thousand years before any law of man was made; which ligeance or obedience (being the only mark to distinguish a subject from an alien) could not be altered; therefore it remaineth still due

Ante 13 a.

by the law of nature. For *leges naturæ perfectissimæ sunt et immutabiles, humani vero juris conditio semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascuntur, vivunt, moriuntur.*

Lastly, whosoever at his birth cannot be an alien to the King of England, cannot be an alien to any of his subjects of England: but the plaintiff at his birth could be no alien to the King of England; *ergo* the plaintiff cannot be an alien to any of the subjects of England. The *major* and *minor* both be *propositiones perspicue veræ*. For as to the *major* it is to be observed, that whosoever is an alien born, is so accounted in law, in respect of the King: and that appeareth first, by the pleading so often before remembered, that he must be *extra ligeantiam Regis*, without any mention making of the subject. 2. When an alien born purchaseth any lands, the King only shall have them, though they be holden of a subject, in which case the subject loseth his seigniory. And as it is said in our books an alien may purchase *ad proficuum Regis*; but the act of law giveth the alien nothing: and therefore if a woman alien marrieth a subject, she shall not be endowed (1.), neither shall an alien be tenant by the curtesy. *Vide* 3 H. 6. 55 a. 4 H. 8. 179. 3. The subject shall plead that the defendant is an *alien born, for the benefit of the King, that he upon office found may seize; and 2. that the tenant may yield to the King the land, and not to the alien, because the King hath best right thereunto. 4. Leagues between our Sovereign and others are the only means to make aliens friends, *et fœdera percutere*, to make leagues, only and wholly pertaineth to the King. 5. Wars do make aliens enemies, and *bellum indicere* belongeth only and wholly to the King, and not to the subject, as appeareth in 19 Ed. 4. 4. fol. 6 b 6. The King only without the subject may make not only letters of safe conduct, but letters patent of denization, to whom, and how many he will, and enable them at his pleasure to sue any of his subjects in any action whatsoever real or personal, which the King could not do without the subject, if the subject had any interest given unto him by the law in any thing concerning an alien born. Nay, the law is more precise herein than in a number of other cases to of higher nature: for the King cannot grant to any other to make of strangers born, denizens; it is by the law itself so inseparably and individually annexed to his royal person (as the book is in 20 H. 7. fol. 8.) For the law esteemeth it a point of high prerogative, *jus majestatis, et inter insignia summæ potestatis* to make aliens born subjects of the realm, and capable of the lands and inheritances of England in such sort as any natural born subject is. And therefore by the statute of 27 H. 8. c. 24. many of the most ancient prerogatives and royal flowers of the crown, as authority to pardon

Co. Lit. 2 b.

1 Vent. 419.

Br. Denizen 1.
Fitz. Dower
179.

[* 25 b.]

Br. Patents 111.

(1.) But if a woman alien marries by the Vid. Hargrave's Note (9). Co. Litt. 39 b.
licence of the King, she shall be endowed.

treason, murthre, manslaughter, and felony, power to make Justices in eyre, Justices of assise, Justices of peace, and gaol delivery, and such like, having been severed and divided from the crown, were again re-united to the same: but authority to make letters of denization was never mentioned therein to be resumed, for that never any claimed the same by any pretext whatsoever, being a matter of so high a point of prerogative. So as the pleading against an alien, the purchase by any alien, leagues and wars between aliens, denizations, and safe conducts of aliens, have aspect only and wholly unto the King. It followeth therefore, that no man can be alien to the subject that is not alien to the King. *Non potest esse alienigena corpori, qui non est capiti, non gregi qui non est Regi.*

[• 26 a.]

The authorities of law cited in this case for maintenance of the judgment, 4 H. 3. tit. Dower. Bracton, lib. 5. fol. 427. Fleta, lib. 6. cap. 47. *In temp. E. 1.* Hingham's Report. 17 Ed. 2. cap. 12. 11 Ed. 3. *cap. 2. 14 Ed. 3. *Statut. de Franciâ.* 42 Ed. 3. fol. 2. 42 Ed. 3. cap. 10. 22 Lib. Ass. 25. 13 Rich. 2. cap. 2. 15 Rich. 2. cap. 7. 11 Hen. 4. fol. 26. 14 Hen. 4. fol. 19. 13 H. 4. *Statutum de Guyan.* 29 Hen. 6. tit. Estoppel 48. 28 H. 6. cap. 5. 32 Hen. 6. fol. 23. 32 Hen. 6. fol. 26. *Littl. temps* Ed. 4. lib. 2. cap. Villenage: 15 Ed. 4. fol. 15. 19 Ed. 4. 6. 22 Ed. 4. cap. 8. 2 Rich. 3. 2. and 12. 6 Hen. 8. fol. 2. Dyer. 14 H. 8. cap. 2. No manner of stranger born out of the King's obeisance, 22 H. 8. c. 8. Every person born out of the realm of England, out of the King's obeisance, 32 H. 8. c. 16. 25 H. 8. c. 15, &c. 4 Ed. 6. Plowd. Comment. fol. 2. Fogassa's case. 2 and 3 Ph. and Mar. Dyer 145. Shirley's case. 5 El. Dyer 224. 13 El. c. 7. *de Bankrupts.* All commissions ancient and late, for the finding of offices, to entitle the King to the lands of aliens born; also all letters patent of denization of ancient and later times do prove, that he is no alien that is born under the King's obedience.

The 5th general part concerning inconveniences.

Now we are come to consider of legal inconveniences: and first of such as have been objected against the plaintiff; and, secondly, of such as should follow, if it had been adjudged against the plaintiff.

Of such inconveniences as were objected against the plaintiff, there remain only four to be answered; for all the rest are clearly and fully satisfied before: 1. That if *postnati* should be inheritable to our laws and inheritances, it were reason they should be bound by our laws; but *postnati* are not bound by our statute or common laws; for they having (as it was objected) never so much freehold or inheritance, cannot be returned of juries, nor subject to scot or lot, nor chargeable to subsidies or quinzimes, nor bound by any act of parliament made in England. 2. Whether one be born within the kingdom of Scotland or no, is not triable in England, for that it is a thing done out of this realm, and no jury can be returned for the trial of any such issue: and what inconvenience should thereof follow, if such pleas that wanted trial should be allowed

(for then all aliens might imagine the like plea) they that objected it, left it to the consideration of others. 3. It was objected, that this innovation was so dangerous, that the certain event thereof no man could foresee, and therefore some thought it fit, that things should stand and continue as they had been in former time, for fear of the worst. 4. If *postnati* were by law legitimated in England, it was objected what inconvenience and confusion should follow if (for the punishment of us all) the King's royal issue should fail, &c. whereby those kingdoms might again be divided. All the other arguments and objections that have been made have been all answered before, and need not to be repeated again. [* 26 b.]

1. To the first it was resolved, that the cause of this doubt was the mistaking of the law: for if a *postnatus* do purchase any lands in England, he shall be subject in respect thereof, not only to the laws of this realm, but also to all services and contributions, and to the payment of subsidies, taxes, and public charges, as any denizen or Englishman shall be; nay, if he dwell in England, the King may command him, by a writ of *Ne exeat regnum*, that he depart not out of England. But if a *postnatus* dwell in Scotland, and have lands in England, he shall be chargeable for the same to all intents and purposes as if an Englishman were owner thereof, and dwelt in Scotland, Ireland, in the isles of Man, Guernsey, or Jersey, or elsewhere. The same law is of an Irishman that dwells in Ireland, and hath land in England. But if *postnati*, or Irishmen, men of the Isles of Man, Guernsey, Jersey, &c. have lands within England, and dwell here, they shall be subject to all services and public charges within this realm, as any Englishman shall be. So as to services and charges, the *Postnati* and Englishmen born are all in one predicament.

2. Concerning the trial, a threefold answer was thereunto made and resolved: 1. That the like objection might be made against Irishmen, Gascoins, Normans, men of the Isles of Man, Guernsey, and Jersey, of Berwick, &c. all which appear by the rule of our books to be natural born subjects; and yet no jury can come out of any of those countries and places, for trial of their births there. 2. If the demandant or plaintiff in any action concerning lands be born in Ireland, Guernsey, Jersey, &c. out of the realm of England, if the tenant or defendant plead, that he was born out of the ligeance of the King, &c. the demandant or plaintiff may reply, that he was born under the ligeance of the King at such place within England; and upon the evidence the place shall not be material, but only the issue shall be, whether the demandant or plaintiff were born under the ligeance of the King in any of his kingdoms or dominions whatsoever: and in that case the jury, (if they will) may find the special matter, viz. the place where he was born, and leave it to the judgment of the court: and that jurors may take knowledge of things done out of the realm in this and like cases, *vide* 7 H. 7. 8 b. 20 Ed. 3. Averment 34. 5 Ric. 2. tit. Trial 54. 15 Ed. 4. 15. 32 H. 6. 25. Fitz. Nat. Brev. 196. *Vide* Dowdale's case, in the [* 27 a.]

Co. Lit. 261 a.
b. 6 Co. 47 a.

Sixth Part of my Reports, fol. 47. and there divers other judgments be vouched (*). 3 Brown, in anno 32 H. 6. reporteth a judgment then lately given, that where the defendant pleaded that the plaintiff was a Scot, born at St. John's town in Scotland, out of the ligeance of the King; whereupon they were at issue, and that issue was tried where the writ was brought, and that appeareth also by 27 Ass. pl. 24. that the jury did find the Prior to be born in Gascoin. (for so much is necessarily proved by the words *trove fuit*.) And 20 Ed. 3. tit. Averment 34. in a *juris utrum*, the death of one of the vouches was alleged at such a castle in Britain, and this was inquired of by the jury; and it is holden in 5 Rich. 2. tit. Trial 54. that if a man be adhering to the enemies of the King in France, his land is forfeitable, and his adherency shall be tried where the land is, as oftentimes hath been done, as there it is said by Belknap: and Fitz. Nat. Br. 196 in a *Mordanc.*, if the ancestor died in *itinere peregrinationis suæ vers. Terram Sanctam* the jury shall enquire of it: but in the case at bar, seeing the defendant hath pleaded the truth of the case, and the plaintiff hath not denied it, but demurred upon the same, and thereby confessed all matters of fact, the Court now ought to judge upon the special matter, even as if a jury upon an issue joined in England, as it is aforesaid, had found the special matter, and left it the court.

3. To the third it was answered and resolved, that this judgment was rather a renovation of the judgments and censures of the reverend judges and sages of the law in so many ages past, than any innovation, as appeareth by the book and bookcases before recited: neither have judges power to judge according to that which they think to be fit, but that which out of the laws they know to be right and consonant to law. *Judex bonus nihil ex arbitrio suo faciat, nec proposito domesticæ voluntatis, sed juxta leges et jura pronuntiat.* And as for timores, fears grounded upon no just cause, *qui non cadunt in constantem virum, vani timores æstimandi sunt.*

2 Ventris 6.

[* 27 b.]

Note, on the abdication of K. James 2. they were divided; but are now consolidated by the union act.

4. And as to the fourth, it is less than a dream of a shadow, or a shadow of a dream: for it hath been often said, natural legitimation respecteth actual obedience to the Sovereign at the time of the birth; for as the *Antenati* remain aliens as to the crown of England, because they were born when there were several Kings of the several kingdoms, and the *uniting of the kingdoms by descent subsequent cannot make him a subject to that crown to which he was alien at the time of his birth: so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert) should by descent be divided, and governed by several Kings; yet it was resolved, that all those that were born under one natural obedience while the realms were united under one Sovereign, should remain natural born subjects, and no aliens; for that naturalization due and vested by birthright, cannot by any separation of the crowns afterward be taken away: nor he that was by judgment of law a

(*) Vid. note *Dowdale's case*, 6 Rep. 47 b.

natural subject at the time of his birth, become an alien by such a matter *ex post facto*. And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque Regis*, as Bracton saith in the afore remembered place, fol. 427. *Sicut Anglicus non auditur in placitando aliquem de terris et tenement' in Franciâ, ita nec debet Francigena et alienigena, qui fuerit ad fidem Regis Franciæ, audiri placitando in Angliâ: sed tamen sunt aliqui Francigenæ in Franciâ qui sunt ad fidem utriusque; et semper fuerunt ante Normaniam deperditam et post, et qui placitant hic et ibi, ed ratione qua sunt ad fidem utriusque, sicut fuit Willielmus comes mareschallus et manens Angliâ, et M. de Gynes manens in Franciâ, et alii plures.* Concerning the reason drawn from the (a) etymologies, it made against them, for that by their own derivation *alienæ gentis* and *alienæ ligeantix* is all one: but arguments drawn from etymologies are too weak and too light for judges to build their judgments upon: for *sæpenumero ubi proprietas (b) verborum attenditur, sensus veritatis amittitur*: and yet when they agree with the judgment of law, judges may use them for ornaments. But on the other side, some inconveniencies should follow, if the plea against the plaintiff should be allowed: for first it maketh ligeance local: *videlicet, ligeantia Regis regni sui Scotiæ, and ligeantia Regis regni sui Angliæ*: whereupon should follow, first, that faith or ligeance, which is universal, should be confined within local limits and bounds: secondly, that the subjects should not be bound to serve the King in peace or in war out of those limits; thirdly, it should illegitimate many, and some of noble blood, which were born in Gascoign, Guienne, Normandy, Calais, Tournay, France, and divers other of his Majesty's dominions, whilst the same were in actual *obedience, and in Berwick, Ireland, Guernsey, and Jersey, if this plea should have been admitted for good. And, thirdly, this strange and new devised plea inclineth too much to countenance that dangerous and desperate error of the Spencers, touched before, to receive any allowance within Westminster-hall.

(a) Co. Lit. 68 b.

(b) 9 Co. 110 b.

[* 28 a.]

In the proceeding of this case, these things were observed, and so did the Chief Justice of the Common Pleas publicly deliver in the end of his argument in the Exchequer Chamber. First, that no commandment or message by word or writing was sent or delivered from any whatsoever to any of the Judges, to cause them to incline to any opinion in this case; which I remember, for that it is honourable for the state, and consonant to the laws and statutes of this realm. Secondly, there was observed, what a concurrence of judgments, resolutions, and rules, there be in our books in all ages concerning this case, as if they had been prepared for the deciding of the question of this point: and that (which never fell out in any doubtful case) no one opinion in all our books is against this judgment. Thirdly, that the five Judges of the King's Bench, who adjourned this case into the Exchequer Chamber, rather adjourned it for weight than difficulty, for all they in their arguments *una voce* concurred with the judgment. Fourthly,

† 5 Co. 127 b.
Co. Lit. 218 a.
2 Inst. 137.
Cart. 13. 6 Co.
87 a.

that never any case was adjudged in the Exchequer Chamber with greater concordance and less variety of opinions, the Lord Chancellor and twelve of the judges concurring in one opinion. Fifthly, that there was not in any remembrance so honourable, great, and intelligent an auditory at the hearing of the arguments of any Exchequer Chamber case, as was at this case now adjudged. Sixthly, it appeareth, that *jurisprudentia legis communis Angliæ est scientia socialis et copiosa*: sociable, in that it agreeth with the principles and rules of other excellent sciences, divine and human: copious, for that *quamvis ad ea quæ frequentius accidunt jura adaptantur*, yet in a case so rare, and of such a quality, that loss is the assured end of the practice of it (for no alien can purchase lands, but he loseth them; and *ipso facto* the King is entitled thereunto, in respect whereof a man would think few men would attempt it) there should be such a multitude and *farrago* of authorities in all successions of ages, in our books and bookcases, for the deciding of a point of so rare an accident. *Et sic determinata et terminata est ista quæstio.*

[* 28 b.] *The Judgment in the said Case, as entered on Record, &c.*

“Whereupon all and singular the premises being seen, and
“by the Court of the Lord the now King here diligently in-
“spected and examined, and mature deliberation being had
“thereof; for that it appears to the Court of the Lord the
“now King here, that the aforesaid plea of the said Richard
“Smith and Nicholas Smith above pleaded, is not sufficient
“in law to bar the said Robert Calvin from having an answer
“to his aforesaid writ: therefore it is considered by the Court
“of the Lord the now King here, that the aforesaid Richard
“Smith and Nicholas Smith to the writ of the said Robert do
“further answer.”

[See now the statutes for the union of both kingdoms.]—*Note to former Edition.*

BULWER'S CASE.

Mich. 26 & 29 Eliz.

B. brought an action on the case in the county of N. for maliciously causing him to be outlawed in London upon process sued out of a Court at Westminster, and causing him to be imprisoned in N. upon a *capias ullagatum* directed to the Sheriff of that county, but issued at Westminster; and upon demurrer it was adjudged that the action was well brought in the county of N.

BULWER
v.
SMITH.

In all cases where the action is founded on two things done in several counties, and both are material or traversable, and the one without the other does not maintain the action, the plaintiff may bring his action in which county he will. S. C. 4 Leon. 52.

BULWER of Dalling in Norfolk, brought an action on his case against George Smith, and declared that one Henry Heydon, Esq. did recover 20*l.* &c. in the Common Pleas against the plaintiff, and after judgment, and before execution, the said Henry Heydon died, and afterwards the said defendant knowing thereof, at W. in the county of Norfolk to outlaw the plaintiff upon the said judgment in the name of Henry Heydon *malitiosè et deceptivè machinatus est*, in performance of which the defendant, Trin. 23 Eliz. at Westminster in Middlesex, purchased a writ of *Capias ad satisfaciendum*, in the name of the said Henry, upon the said judgment, directed to the Sheriffs of London, who by the procurement of the defendant returned *Non est inventus*; whereupon the defendant purchased a writ of *Exigent* in the name of the said Henry, which writ the said sheriff by the procurement of the said defendant returned, that at several hustings the said now plaintiff had been demanded, *et ad hustingum ad communibus placitis tent' in Guild-hallâ civitatis præd' die Lun' prox' post festum Apostol. Simonis et Jud', anno supradict' præd' the now plaintiff, quint' exactus fuit, &c., et ideo ipse the plaintiff ullagatus fuit*: and afterwards Pasch. 24 El. the defendant purchased out of the said Common Pleas a writ of *Capias ullagatum*, in the name of the said Henry, directed to the Sheriff of Norfolk, to arrest his body, &c. which writ did mention that the said now plaintiff was outlawed *die Lun' prox' ante festum Apostolorum Simonis et Jud', &c.* And the said writ the defendant at W. aforesaid in the said county of Norfolk, did deliver to one Robert Godfrey then deputy to the Sheriff of the said county, to the intent that he should execute the said writ, the which Robert by force of the said writ took, and arrested the said now

Noy. 22. S. P.
4 B. and A. 95.

Cr. Jac. 667.
Cr. El. 629.

[* 1 b.]

Ibi semper debet fieri triatio, ubi juratorum meliorem possunt habere notitiam.

(a) Cr. El. 574. 844. Dyer 38. pl. 51. Cr. Car. 20, 21. Dy. 40. pl. 66.

Where matter in one county is depending upon matter in another county, the plaintiff may choose in which county he will bring his action unless the defendant should be prejudiced in his trial.

(b) 1 Sid. 218. 219. 401. 1 Mod. Rep. 198. 199. Winch. 100. Latch. 262. 1 Brownl. 12. 69. Cr. Jac. 533. Nov. 22. Hob. 196. 209. Dyer 38. pl. 54. Cr. El. 574. 844. Plow. 530. (c) 4 Leon. 53. 2 Roll. Rep. 239. 'Stanf. Cor. 166 d.

plaintiff, and did imprison him by the space of two months, until the now plaintiff purchased his charter of pardon, by reason of which outlawry he forfeited all his goods and chattels: and upon this declaration the defendant did demur in law; and the principal cause of the demurrer was because this action, by the pretence of the defendant, *ought to have been brought in Middlesex where the wrong began, for there (as it was said) the defendant took out as well the *Cap' ad satisfac'* as the *Exigent* and the *Cap' utlagatum* also. And although the *Cap' utlagat'* was executed in Norfolk, yet the action ought to be brought where the wrong began; as in the case of Conspiracy in 42 E. 3. 14 a. and divers other cases also were put; also by the outlawry which was in London all his goods and chattels were forfeited where it is more reason to bring the action than in Norfolk. But it was answered and resolved, that the (a) action was well brought in Norfolk; for it is a maxim in law, *quod ibi semper debet fieri triatio, ubi jurator meliorem possunt habere notitiam*. And in Norfolk was the visible wrong, for there the plaintiff was imprisoned for the space of two months, and therefore it is great reason that the plaintiff may have his action there; and it doth not appear by the record what goods or chattels the plaintiff had at the time of the outlawry, but for the aggravating of the damages, the plaintiff may give in evidence what goods and chattels he hath forfeited by the outlawry. And this action doth consist upon two principal parts, the one, matter of record, and the other matter in fact; and none of the matters of record, but is mixed with matter of fact; and no matter of fact, but is mixed with matter of record: for the writs and the outlawry are matters of record, but mixed with matters in fact, *sc.* purchasing, and prosecution of them by the defendant in the name of Henry Heydon, which are matters in fact; also the imprisonment is a matter in fact, but it is mixed with the writ of *Cap' utlagat'*, which is of record, *sc.* if the plaintiff was arrested by virtue thereof. And matters in fact are triable only by the country and not matters of record; and when one matter in one county is depending upon the matter in the other county, there the plaintiff may (b) choose in which county he will bring his action (unless the defendant upon the general issue pleaded, should be prejudiced in his trial, as he would not be in this case) as if two (c) conspire to indict a man in one county, and they by their malicious prosecution make the execution of their conspiracy in another county, and there cause the party to be indicted, the plaintiff may have his action of conspiracy in which county he will, for they put their conspiracy in one county in execution in the other, and the matter of record of the indictment is mixed with the matter of fact. But if they conspire in one county, by force of which conspiracy without any other act by them, he is indicted in another county, there the writ ought to be brought in the county where the conspiracy was, for the defendants have

done nothing in the county where the indictment was, nor were parties nor privies to the finding of the indictment, but only by the conspiracy in the other county. And that appears in 14 E. 4. 3 b. and so the books in (d) 42 E. 3. 14 a. 20 (c) H. 6. 10 a. b. F. N. B. (f) 116 b. and other books are well reconciled. If a (g) menace be made in Essex by which my tenants depart in London, I shall have my action in Essex, and not *in London, for in such case I have done nothing in London, 9 H. 6. 42 b. In all cases where the action is founded upon two (a) things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will (A), as it is if a servant be (b) retained in one county and departs in another, and therewith agree 41 E. 3. 1 b. 34 H. 6. 18 a. 38 H. 6. 15 b. 15 E. 4. 6. 20 H. 6. 11. 29 H. 8. Dyer 38. 20 E. 3. 25., &c. So if a man be arrested in execution in one county, and he (c) escapes into another county, the plaintiff may choose to bring his action in which of the counties he will, and therewith agree 15 E. 4. 3 a. b. 30 H. 6. 6 a. b. 11 El. Dy. 278. So in a writ of (d) annuity founded on a prescription against a man of religion, or body corporate, where the church or house is in one county, and the seisin is alleged in another county, the plaintiff may choose in which county he will bring his action. 48 E. 3. 26. a. b. 4 H. 4. 1. 4 H. 6. 5 b. 10 H. 6. 19 a. b. 39 H. 6. 15 b. 2 E. 4. 28 b. 4 E. 4. 26 a., &c. F. N. B. 152 e. Otherwise if the annuity be granted in one county to be paid in another, the action lies where the grant was, and so is † 8 H. 6. 23 b. So if a man cites one in one county to appear before (e) the Admiral in another county, for a thing done in the body of the county, by force of which the party appears, he may have his action in the one county or the other at his pleasure, 5 Ma. Dyer 159 b. 42 E. 3. 14 a. 44 E. 3. 31 b. 52 a. 46 E. 3. 8 b. 3 H. 4. 3 a. 38 H. 6. 14 b. 14 E. 4. 3 a. b. The same law of the Spiritual Court. So if the defendant casts a protection in one county, and remains in another county, he may bring his action in which of the counties he pleases. 20 H. 6. 10 a. b. So if a man strikes a person in one county (f), and he dies in another county, the appeal of murder may be brought in the one or the other county, and yet the defendant did nothing in the county where the party died, but the (g) death which ensued on the stroke

(d) Fitz. Conspiracy 10.
Br. Conspir. 6.
(e) Br. Lieu 3.
(f) F. N. B. 116 m.

[* 2 a.]
(g) Br. Lieu 91.
Br. Wast. 9.
(a) Dyer 39.
pl. 57. 1 Vent. 364. 1 Saund. 239, 240, 241.
(b) Fitz. Labor. 22. Stattham Laborers 5. Br. Lieu 11. Dy. 38. pl. 53. 40. pl. 70. Plowd. 37 b. 4 Leon. 53. 14 E. 4. 3 b. Br. Lieu 72. (c) 4 Leon. 53. Cr. El. 271. 625. 2 Roll. 602. Dy. 278. pl. 5. 38. pl. 53. Br. Lieu. 33. 43. 72. 82. (d) Plow. 530. 12 E. 4. 3 a.

† Br. Lieu 27.
(e) Hob. 196.

(f) Dyer 40. pl. 71.

(g) 4 Co. 42 b.

(A) Acc. *Gregson v. Heather*, Strange 727. *Scott v. Brest*, 2 T. R. 235. *Mayor of London v. Cole*, 7 T. R. 583. In *Gybbin's case*, Cro. Eliz. 646. the Court held that, in an action on stat. 1 and 2 P. and M. c. 12. for driving a distress out of the place where taken, into another county, the *venire facias* ought to have been from both counties, for the tort consisted of two parts; *Bulwer's*

case, which had been decided 13 years before, seems to have escaped the notice of the Court. However in the recent case of *Pope v. Davis*, 2 Taunt. 252. the Court decided that the *venue* might be laid in either county. Vid. also *Rex v. Burdett*, 4 B. and A. 175. Com. Dig. Action N. 3—11. 1 Chitty on Pleading, 242. 4th ed.

(A) Br. Appeal 8. Br. Visn. 78.
 (i) Dyer 39. pl. 56. 40. pl. 66. Kelw. 160 b.
 (k) Dyer 39. pl. 56. Stanf. 63 g. Winch. 69.
 Latch. 197. 271. See Rep. Q. A. 8, 9, &c. Forres. 157. Salk. 614. 2 H. P. C. 163.
 Debt on a lease for years in one county of land in another county, must be brought in the county

[* 2 b.]

where the lease was made, otherwise of an action of waste.

(f) Cr. Car. 184. Dyer 40. pl. 70. Cr. Jac. 142. Cr. El. 116. 259. 565. 12 E. 4. 3 a. Br. Lieu 43. 5 E. 4. 21 b.
 (a) Dy. 40. pl. 70. 6 Mod. 194. 1 Sand. 238. 1 Jon. 41. 44.
 (b) Dy. 38. pl. 53. 54. Hob. 37. 1 Cro. 143. 183.

When the defendant shall be prejudiced in his trial, the plaintiff has no election.

(c) Dy. 38. pl. 54. 39. pl. 57.
 (d) Dyer 38. pl. 54. 39. pl. 57. 4 B. and A. 174.

makes the felony. 18 E. 3. 32. 9 H. 6. 63. 45 Ass. pl. 9. 43 Ed. 3. 3 (h) H. 7. 12 a. 4 H. 7. 18. 6 H. 7. 10. 11 H. 4. 93. If a man commits (i) a robbery in one county, and carries the goods into divers counties, the party robbed may have an appeal of felony in which of the counties he will, but not an (k) appeal (b) of robbery but only in the county where the robbery was done; for it is felony in all the counties where the goods are carried (for felony doth not divest property) but it is not robbery (which ought to be done to the person of a man) but only in the county where the robbery was done. 4 H. 7. 5 b. 29 H. 8. 39, 40. Dyer, 11 H. 4. 93. 3 E. 3. tit. Ass. 446. In debt if a man declares on a lease (l) for years in one county of land in another county, he ought to bring his action where the lease was made, and not where the land lies; for the action is grounded upon the contract made by the lease (c). 38 H. 6. 15. acc. *per cur.* 8 H. 6. 23. acc. *vide* 4 H. 6. 18. 14 E. 4. 3. 29 H. 8. 40 Dyer. So the law well explained in a case in which are *varieties of opinions in our books. But if a lease be made in one county, and the land lies in another, the action of (a) waste shall be brought where the land lies, and not where the lease was made, although the term be passed; for the land and damages, or damages only for the waste which is local, shall be recovered. 14 E. 4. acc. If a man promises to (b) cure one in one county, and misdoeth in another county, the plaintiff hath his election to bring his action in which of the counties he will, and therewith agrees 11 R. 2. *Action sur le Case* 37. If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H. 4. 8; or I may bring it in Middlesex, for there I have the damage, as it is proved by 11 R. 2. *Action sur le Case* 36. So if one forge a (c) deed in one county and proclaims it in another, the plaintiff may choose in which county he will bring his action. 29 H. 8. 38. 22 H. 6. 5 a. b. But when the defendant upon pleading not guilty shall be prejudiced in his trial, there the plaintiff hath not election to bring his action in which county he will, (d) 29 H. 8. Dyer 38. where Gawyn sued an appeal of robbery in the county of Wilts where the robbery was done, against Hussey and Gibbs, as accessaries, and declared that the principals named in the writ, and who were attainted, did the robbery in the county of Wilts, and that the defendant feloniously at London, before the robbery done, did abet them to do it; and

(b) Appeals of murder, treason, felony, or other offences, are abolished by stat. 59 Geo. 3. c. 46.

(c) He may bring his action in either county, *Gawen v. Hussee and Gibbs*, Dyer 40 a. *King v. Fraser*, 6 East. 353. In an action upon a lease for non-payment of rent or other breach of covenant when the action

is founded on privity of contract it is transitory, and the venue may be laid in any county: but when the action is founded in the privity of estate, it is local, and the venue must be laid in the county where the estate lies. *Vide* Serjt. Williams's notes 5. and 6. to *Thursby v. Plant*, 1 Saund. 241,

it was adjudged, that although the plaintiff can have but (e) one appeal against the principals and accessaries, and against the principal of necessity it ought to be brought in the county of Wilts, yet because those of the county of Wilts upon not guilty pleaded, and London cannot join, and those in Wilts cannot inquire of a thing in London, although it be transitory (for in case of felony which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done) the appeal against the said accessaries did abate, 43 E. 3. 17, 18, 19. And it is to be observed, that in all real actions, if any issue rises on the land, or in any action in which the possession of the land or (f) local thing, or which rises on the land by reason thereof, is to be recovered, all these shall be brought in the county where the land lies; as in a writ of right of ward of land, or writ of intrusion of ward, these shall be brought in the county where the land lies; although the refusal were, or the seigniorship be in another county, 29 E. 3. 3. 38 H. 6. 14 b. 22 R. 2. Bre. 937. acc. So in a writ of right of ward for the body only, it shall be brought in the county where the land is, for that is in the right and savours of the land, 21 E. 3. 42. 30 E. 3. 25. 9 E. 3. 12, 13. 10 E. 3. 7. acc. and the reason of 40 E. 3. 6. agrees with it, although the judgment there is mentioned to be given contrary. But a writ of ravishment of ward shall be brought where the ravishment was, and not where the land is, or where the body is carried: for it *is founded on the ravishment. 38 H. 6. 14 b. 22 R. 2. Brev. 937. and 12 E. Dy. 289. And a writ of forfeiture of marriage shall be brought where the land is, for the writ doth suppose an intrusion into the land; and therewith agrees the said book in 22 R. 2. and 38 H. 6. 15 a. And a writ *de valore (a) maritagii* shall be brought where the land is; for the lord need not make any (b) tender: but if he makes a tender, and the other refuses, and he alleges it in the county, then the writ *de valore maritagii* lies in the county where the refusal was, 22 R. 2. Brev. 937. 38 H. 6. 15 a. Writs of *Qu. imp.* and *Qu. incumbravit* (c) shall be always brought where the church is; for by the one the plaintiff shall recover his presentment, and by the other the Bishop's clerk shall be removed, and the plaintiff's clerk admitted, 38 H. 6. 14 and 15 accord. *Vide* 4 Ed. 3. 9. Otherwise it is in the King's case. But a *Qu. (d) non admisit* shall be brought in the county where the refusal was, and not in the county where the church is, because damages are only to be recovered, and the refusal is the beginning of the wrong, and the ground of the action; and so is the book adjudged in 38 H. 6. 14 and 15. F. N. B. 47. f. And a *Qu. imp.* of a Prebend shall be brought in the county where the cathedral church is, and not in the county where the body of the Prebend is; for the plaintiff's clerk is to be inducted and installed in the cathedral church, and therewith agrees 21 E. 3. 5. and 2 El. Dy. 194. (e) but 43 E. 3. 34. and 15 Ed. 3. Br. 325. seem contrary. 24 E. 3. 37. And so the law is well explained in a case in which there were different opinions in our

(c) 4 Co. 47 b.
Jenk. Cent. 29.

All real actions, if any issue rises on the land, or any action in which the possession of the land or local thing, or which rises on the land by reason thereof, is to be recovered, must be brought in the county where the land lies. (f) Dyer 38. pl. 52. Hob. 37. Winch. 69.

[*3 a.]
Litch. 197.
Cr. Car. 143.
184.
F. N. B. 140. f.
Regist. 163 a.
Note.
(a) Br. Lien 43.
(b) 5 Co. 127 a. b.

(c) F. N. B. 48.
c.

(d) Dy. F. N. B.
47. f. 40. pl. 69.

(e) Dyer 194.
pl. 33.

A man having a rent issuing out of two counties, could not at common law have an assise in one county.

(f) Co. Lit. 147 a. Post. 3 b. 24 a. b.

(g) 2 Inst. 231.

(h) 2 Inst. 231. 1 Saund. 73. n 2.

[* 3 b.]

Fitz. Assise 10. Br. Assise 76.

If a fine or feoffment be made of lands in two counties with warranty, *warrantia chartæ* may be brought in either. Co. Lit. 154 a. 4 Co. 4 b.

books. And if a man at the common law had a rent issuing out of two counties, he could not have had an (f) assise in one county, because every part of the land in the two counties is charged with the rent, and all should be put in view, as it is agreed in 18 E. 2. Ass. 380. 18 E. 3. 32. 10 E. 3. 21. 10 Ass. p. 4. and 18 Ass. p. 1. But if a man makes a lease *pur auter vie* of land in two counties, rendering rent, and the rent is behind, and *cest' que vie* dies, the lessor shall have an action of debt in which of the counties he will, for now it is changed into debt; and in that case no land shall be put in view, but the person of the debtor shall be only charged by the common law. So if a rent be issuing out of the land of B. in two counties, and the rent is behind, and he who has the rent dies, his executors may have an action of debt against B. in which of the counties they will, on the statute of 32 H. 8. cap. 37.; for although he ought to bring his action in one of the counties, yet at the common law the person of the defendant is chargeable in the action of debt, and not the land. And before the statute of (g) 6 R. 2. c. 2. a writ of debt and account against a receiver, and such actions might be brought in such county where the party might be best brought in to answer, and the plaintiff might have declared on a contract or receipt, &c. in any other county, *quod debitum et contractus, &c. sunt (h) nullius loci*. See for that 2 Ed. 3. 44. 6 Ed. 3. 266. and 275. 8 E. 3. 380. * 10 E. 3. 7. 19 E. 3. Jurisd. 29. 29 E. 3. 26. 33 E. 2. tit. Jurisd. 57. 40 E. 3. 7. 3 H. 6. 30. 15 E. 4. 19. 21 E. 4. 88. As in 22 H. 6. 9 and 10 a. b. where the King granted the office of Surveyor of packing of all manner of cloths within London and the liberties thereof, which are in two counties, and the assise was brought in Middlesex, and there Newton and Paston said, that there is a great difference between an assise of rent and that assise; for where a rent-charge is issuing out of lands in divers counties, every parcel is chargeable with the whole, and all the ter-tenants ought to be named; but here the person is charged and not the land, and yet the office for which the assise was brought did extend in two counties. And if a fine or feoffment be made of lands in two counties, with warranty, the *Warrant' chartæ* may be brought in any of the counties, 29 E. 3. 3 a. b. It is purviewed by the statute of 7 R. 2. c. 10., that an assise of *Nov' disseis.* shall for the future be granted and made of a rent behind, due for tenement in divers counties to be held *in confin' comitat'*; and thereupon the assise shall be taken and tried by the people of the same county, in the same manner and form as it is done of a common of pasture in one county appendant to tenements in another county: for at the common law, if a man had had common in land in one county appendant or appurtenant to land in another county, he should have two several writs to the Sheriffs of the several counties. Or if the land to which, &c. lay in one county, and the land in which, lay in several counties, there he should have a writ of assise to the Sheriff of the county where the land to which, &c. lay, and several writs

to the Sheriff of the county where the land in which, &c. lay; and all that appears in the Regist. and F. N. B. 180 a. And the same law is, when a nuisance is done in one county, and the land to which, &c. is in another county, as it appears also in the Register, and F. N. B. 183 k. (n). So that if a man hath a rent in three or four counties, it seemeth that he who is disseised may have several assises to be brought *in confin' comitatuum*; for the letter of the statute of 7 R. 2. is general of rent due for tenements in several counties. And although it hath a reference to the case of common of pasture, &c. yet forasmuch as in the case of common of pasture, if the land in which, &c. lay in several counties, and the land to which, &c. lay in another county, there should be as many writs as there are several counties; thence it follows, that such remedy he shall have who hath a rent issuing out of lands in many counties. Also the case of common is put *exempli gratia et similitudinariè, et null' simile quatuor pedib' currit*; and it is not necessary that a simile should agree in all points. And the statute of 7 R. 2. was made to satisfy a doubt which was conceived before: for thereby it is enacted, that writs in such case shall be made in the Chancery without any manner of contradiction, as well of disseisins before made, as after to be made. And the doubt was on the statute of *Magna Charta, cap. 2. Recognitiones de novis disseisinis et de morte antecessor' non capiuntur nisi in suis comitat'*. And some held, that the same was not observed when the Justices of assise did sit *in confinio comitatuum*; and, namely, when there are twenty counties mesne between the two counties, as it is in the book in 5 E. 4. 2 b. But that doubt also might be conceived on the said assise of *Nov. disseisin* of common when the land in which, &c. is in one county, and the land to which, &c. in another county (in which case without question is not restrained by the said statute. For assise of *Nov. disseisin* of common of pasture lay at the common law, as by the statute of Westminster 2. c. 29. appears), 10 E. 3. 21. and 10 Ass. p. 4. And if need were, the statute of Westminster 2. c. 28. doth extend to the said case of rent, by which it is provided, *quod quotiescunque de cetero exenerit in cancellaria quod in uno casu reperit' brece, et in consimili*

When a nuisance is done in one county, and the land to which, &c. is in another county, there shall be several writs to the Sheriff.
Co. Lit. 154 a.

The reason of making the stat. 7 R. 2.

[* 4 a.]

Co. Lit. 154 a.
Fitz. Assise 26.

(n) In an action on the case for a nuisance, where the nuisance is done in one county, and the lands to which the nuisance is an injury, lie in another, the venue may be laid in the county where the lands lie, although the action is brought on a statute which directs all actions to be brought and tried in the county where the cause of action arises, *Sutton v. Clarke*, 6 Taunt. 29.

In the case of *Rex v. Burdett*, 4 B. and A. 175, it was observed by Abbot, C. J., that he was not aware of any authority pointing to a distinction between local actions and indictments for misdemeanours, and that the power of the jury appears upon principle to be not less limited in the one case than in the other, and it is also

laid down by the same learned judge, that to write and publish a libel is a misdemeanour composed of distinct parts, each of which parts being an act done in prosecution of one and the same criminal intention is a misdemeanour; and where a misdemeanour consists of such distinct parts, the whole may be tried in that county wherein any part can be proved to have been done, *ib.* 170; and the law is laid down in the same case by Holroyd, J. in nearly the same terms. Some of the instances relating to actions cited on Bulwer's case, which were then considered as local, would now be considered as transitory, *ib.* 176. and *vid. Rex v. Taylor*, 3 Barn. and Cress. 502; *Pearson v. Alce Gowran*, 3 Barn. and Cress. 700.

9 Co. 88 b.
Postea 4 b.

F. N. B. 30 c.

F. N. B. 107 p.

[* 4 b.]

(a) 9 Co. 88 b.
Antea 4 a.

casu, cadente sub eod' jure, et simili indigente remedio, non reperit', concordent clerici in cancellar' in brevi faciendo, &c. vel ad proxim' Parliament' de consensu jurisperitor' fiat breve. And the statute concludes with the effect of a maxim of the common law, *quod cur' dom' Regis non debet deficere conquerentibus in justitia perquirenda.* 38 E. 3. 33 a. where the case was, that the King brought a writ of right of the fourth part of the tithes and offerings of the church of St. Dunstan in the West, in Fleet-street, in the suburbs of London, against the Prior of St. John's of Jerusalem in England, there Candish took exception to the writ, because although this writ was given by the statute of Westminster 2. c. 5. toward the end, and artic. Cler. c. 2. which statute gave, that he shall have a writ *Ad petendum advocacion' decimar' petitar', &c.* And this writ is brought of the fourth part of tithes and offerings, which is not warranted by the statute judgment of the writ, forasmuch as the statutes do not give any writ of the fourth part of tithes. Thorpe, the Chief Justice, who gave the rule, said, although the statute do not limit by express words, but of tithes, yet those in the Chancery may make a writ *in consim' casu*, and the writ is good enough; wherefore answer. And in 18 E. 2. Br. 287. a writ of entry was brought in the county of Suffolk, the tenant pleaded a release of the ancestor of the plaintiff with warranty, which was denied, and found for the plaintiff in London, by a jury of Friday-street, &c., for which the demandant did recover; and the tenant brought an attain, and there exception was taken, because in the writ is not comprised to attach the party, judgment, &c. And for the plaintiff it was said, that the writ was granted to the Sheriff of London to summon the 24, and attach the 12, and another writ to the Sheriff of Suffolk to attach the party where the land was, and both the writs were read in Court. To which it was said, that there was no special law, that did maintain that writ which is out of the common course. Berisford the Chief Justice, who gave the rule, said, in a new case, a new remedy, &c. wherefore answer. And therefore, if there be lord and tenant, and the tenancy doth extend into two counties, in this case if the rents and services be behind, the lord may have several writs of customs and services, for every county one writ, and shall have *them returnable at one day in the Common Pleas, and then to count upon them as his case is, *quia aliter curia* (a) *Regis deficeret conquerentibus in justitia perquirenda*, and therewith agree Fitz. Nat. Brev. 151 b. and 30 Ed. 1. *Droit pl. ultimo.* And that is a good example, *pro quolibet consimili casu, &c. simili indigente remedio.* Vide 12 Ed. 1. tit. Attaint 71. a very good case; and the reason and rule of the book in 21 Ed. 3. 18. is to be observed, where the case was, that a fine was levied of a manor in one county, and the tenancy lay in another county; now where the *per quæ servitia* should be brought was the question; and it was adjudged that it was well brought in the county where the manor was. And there Stone gave the rule of the Court in these words: he can have no other writ, for his writ must be according to the fine, and brought in the county where the note

is levied. *Vide* 11 Rich. 2. tit. *Action sur le Case* 36. 7 H. 4. 8. *Vide* 26 Hen. 6. tit. *Covenant* 9. 41 Ass. pl. 12. 9 Hen. 5. 6. 22 Hen. 6. 5. And in the principal case where it was objected, that the said *Capias utlagatum* was erroneous; for it was *proximum ante festum*, &c. where it should be, *post festum*, &c. the Court took no regard to it; for the error in the writ which the defendant himself hath wrongfully brought, shall not (b) advantage himself; but in regard he was imprisoned and troubled thereby, *that* gave the plaintiff cause of action. Also the Court did not regard the clause, that the defendant at W. in the county of Norfolk, &c. *malitiosè et deceptivè machinatus fuit*, &c. for that is so secret and so uncertain, that it cannot be tried.

(b) 4 Leon. 54.
5 Co. 39 a. h.
8 Co. 59 a.
F. N. B. 21 f.
Palm. 39, 40.
2 Sand. 46.
1 Roll. 757, 759,
760. Fitz. Error
92.

*SIR MILES CORBET'S CASE.

[* 5 a.]

Hil. 27 Eliz.

In the Exchequer.

Resolved 1. Where one has purchased divers parcels of land in D. together, in which the inhabitants have used to have shack, and long since has inclosed it; and notwithstanding always after harvest the inhabitants have had shack there, by passing into it by bars or gates with their cattle, then it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common: but if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed their own lands from time to time, and so hath held it in severalty, any owner may inclose, and hold in severalty, and exclude himself to have shack with the others.

2. If the commons of the town of A. and of the town of B. are adjoining, and one ought to have common with the other, by reason of vicinage, and in A. there are fifty acres, and in B. one hundred acres of common, the inhabitants of A. cannot put more cattle into their common of fifty acres than it will feed; *nec e converso*.

CLERE
v.
CORBET.
Part VII.—5 a.

BETWEEN Sir Edw. Clere and Miles Corbet, then Esquire, now a Knight, it was resolved in a case concerning the parsonage of Marham, in the county of Norfolk, that where in the county of Norfolk there is a special manor of common, called Shack, which is to be taken in arable land, after harvest until the land be sowed again, &c. and it began in ancient time in

this manner : the fields of arable land in this country consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to the others, can feed their cattle in their own land ; and therefore every one doth put in their cattle to feed *promiscue* in the open field. These words, "To go Shack," is as much as to say to go at liberty, or to go at large : in which the policy of old times is to be observed, that the severance of fields in such small parcels to so many several persons was to avoid inclosure, and to maintain tillage. But it is to be observed, that the said common, called Shack, which in the beginning was but in the nature of a feeding because of vicinage for avoiding of suit, within some places of that country, is by custom altered into the nature of a common appendant or appurtenant, and in some places it retains its original nature ; and the rule to know it is the custom and usage of every several town or place, for *consuetudo loci est observanda*. And therefore if in the town of D. (*exempli gratia*) one who hath purchased divers parcels together, in which the inhabitants have used to have Shack, and long time since has inclosed it ; and notwithstanding always after harvest the inhabitants have had Shack there, by passing into it by bars or gates with their cattle, there it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common there, notwithstanding he will not common with them, but hold his own lands so inclosed in severalty ; and that is proved by the usage ; for notwithstanding the ancient inclosure, the inhabitants have always had common there. But if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed *their own lands from time to time, and so hath held it in severalty, there this usage proves, that it was but in the nature of Shack originally for the cause of vicinage, and so it continues ; and therefore there he may inclose (A) and hold in severalty, and exclude himself to have Shack with the others. And although in the said case of the town of D. the usage hath been, that notwithstanding the inclosure by divers inhabitants of late times, the other inhabitants have had Shack there ; yet if a man hath an ancient close of ancient time taken out of the field, and he and all those whose estate he hath have held it

† 4 Co. 28 b.
6 Co. 67 a.
10 Co. 140 a.

[* 5 b.]

(A) " There is a passage in Com. Dig. Com. " e. which is incorrect. The passage is this : " If several freeholders who have lands in a " common field intercommon, one of them " cannot prescribe to inclose against the " others." Now this is contrary to 7 Coke, 65. : but the true decision is to be found in 2 Mod. 105, where it is laid down,—" Where " there are several freeholders who have " right of common in a common field, such " a custom to inclose is good, because the " remedy is reciprocal ; for as one may in-

" close, so may another. But Justice At- " kins doubted much of the case at bar, " because the defendant had pleaded this " custom to inclose in bar to a freeholder, " who had no land in the common field " where he claimed right of common, but " prescribes to have such right there as " appendant to two acres of land which he " had *alibet*." This decision is not at variance with 7 Coke 65, per Bayley J. *Cheseman v. Hardham*, 1 Barn and Ald. 712.

always in severalty, he may well keep it inclosed: for as to such parcel so anciently inclosed, the Shack there doth retain its ancient and original nature. And he who claims Shack there cannot prescribe to have common in it. *Nota*, a good resolution, which stands with reason; and no inconvenience, innovation, or cause of suits or trouble can thereupon arise, but quiet and repose will be thereby in many cases established, which I thought fit to be reported, because it is a general case in the said country; and at first the Court was altogether ignorant of the nature of this common called Shack. It was also resolved at the same time, that if the commons of the town of A. and of the town of B. are adjoining, and that one ought to have common with the other by reason of vicinage, and in the town of A. there are fifty acres of common, and in the town of B. there are an hundred acres of common; in that case the inhabitants of the town of A. cannot put more cattle into their common of fifty acres than it will feed, without any respect to the common within the town of B., *nec e converso*; for the original cause of this common for cause of vicinage was not for profit, but for preventing of suits in a champaign country; for the reciprocal escapes of the one town into the other: and therefore if the common of the town of A. will feed fifty beasts, and of the town of B. an hundred beasts, it is no prejudice to the one or the other, if the cattle of one town escape and feed in the common of the other town reciprocally; for if all the cattle feed *promiscue* together through the whole, it will be no prejudice to one or the other.

4 Co. 38 b.
Co. Lit. 122 a.

[Note. The like intercommoning is in Lincolnshire, Yorkshire, and other counties; and in Mich. Term, 18 Car. 2. B. R. Twisden, Justice, said, that this common called Shack was but *Common per cause de vicinage*.]
—*Note to former Edition.*

*Cases upon the Stat. of 13 Ed. 1. [*6 a.] of Winchester.

THE purview of the said act is, "That from henceforth every county be so well kept, that immediately after robberies and felonies committed, fresh suit be made from town to town, and from county to county, &c." And after the felony or robbery is committed, the county shall have no longer space than 40 days, within which 40 (a) days it shall behove them to agree for the robbery or trespass, or else that they answer for the bodies of the offenders, &c. Upon which words divers resolutions have been made.

Weston. 1 c. 9.
2 Inst. 172.
3 Inst. 117, 118.
2 Saund. 423.
5 Co. 67 b.

(a) 2 Inst. 477.
1 Sid. 11.

SENDIL'S CASE.

Trin. 25 Eliz.

In C. B.

If a man be robbed in his own house, be it in the day or in the night, the hundred in which the house is shall not be charged with it.

(b) Cro. El. 753.
acc.

3 Leon. 262.
acc.

2 Inst. 569.
Moor 620.

acc.
(c) Cro. El. 753.

2 Co. 32 a.

5 Co. 91 b.

8 Co. 126 a.

11 Co. 82 a.

1 Bulstr. 146.

(d) 3 Leon. 262.

Cro. El. 753.

6 Mod. 105.

v. 2 Co. 66.

5 Co. 91, 92,

&c.

See 2 Wilson

113.

TRIN. 27 Eliz. it was held by the whole Court of Common Pleas, in a case which happened in Harleston, in the county of Suffolk, that if a man be robbed in his (b) house, be it in the day or in the night, the hundred in which the house is shall not be charged with it: for although the words of the said act are general, without speaking of any place in special, yet such robbery is not within the said act, for three reasons: 1. Because every man's house is his (c) castle, and he ought to keep and defend it at his (d) peril; and if any one be robbed in his house, it shall be esteemed his own default and negligence. 2. It is not lawful for any other to enter into the house of another for the safeguard of it (without the owner's consent). 3. Such robbery, for which the hundred shall answer by force of the said act, ought to be committed openly, so that the country may take notice of it themselves; for it was adjudged in Ashpole's case next following, that it is not necessary to have hue and cry, or notice given to the country, neither by the words of the said act of 13 Ed. 1. nor by the meaning thereof; for it may be, that the party robbed was bound, or maihemed, &c. so that he cannot make hue and cry, or give notice to the country: but when a robbery is secretly done in a house they cannot take notice of it (A).

(A) So if a man be seized in the highway, and carried into a mansion-house, and there robbed, he will be without remedy; per

Holt, C. J., *Cooper v. Hundred of Basingstoke*, 2 L. Ray, 828. S. C. 2 Salk. 614.

ASHPOLE'S CASE.

Trin. 27 Eliz.

In C. B. Rot. 725.

To charge the hundred, the robbery must be in the day-time. S. C. 1 [Leon. 27. 4 Leon. 218. 1 Anders. 158. Goldsb. 55, 60.]

ASHPOLE
v.
INHABITANTS
OF EVENGER.
Part VII.—6 a.

BETWEEN Ashpole and the inhabitants of Evenger, it was resolved by the whole Court, although the statute is general, and doth not make mention of any time, that the robbery ought to be committed in *the day-time (A) and out of the (a) night; and there the case was, that a robbery was committed in January, presently after sun-set, during day-light; and it was adjudged that the hundred should answer, because it was a convenient time for men to travel, or be about their business or work; and therewith agreeth the book in 3 Ed. 3. Coron. (b) 293. that if one kills another at the hour of evening, and escapes by the common law, the town shall be amerced; for it is in law accounted part of the day, and not of the night.

[* 6 a.]
(a) 2 Inst. 569.
Moor 620.
4 Leon. 59, 191.
Sav. 83.
Goldsb. 70.
Cr. El. 270.
(b) Stamf. Cor.
33 b.

(A) Though it must be proved, yet it need not be averred in the declaration, that the robbery was in the daytime. *Young v. Hundred of Fedcombe*, 1 Show. 60. S. C. Carth. 71. If there be sufficient light to discern and distinguish a man's countenance, though be-

fore sun-rise or after sun-set, the hundred will be liable. *Moy v. Hundred of Mortey*, Cro. Jac. 106. Serjt. Williams's note (7) to *Pinkney v. Inhabitants de Rotel*, 2 Saund. 376.

MILBORN'S CASE.

Trin. 29 Eliz.

In C. B. Rot. 1027.

MILBORN
v.
INHABITANTS
OF DUNMOW.
Part VII.—6 b.

The hundred shall not be charged for a robbery committed in the morning,
ante lucem. S. C. [Goldsb. 70. 4 Leon. 59. 191.]

(a) Savil. 83.
1 Sid. 11.

(b) 2 Inst. 569.
Moor 620.
1 And. 159, Cr.
El. 270. Cr. Jac.
106.
See 2 Wilson
109, &c.

The city of
London was
amerced in
1500 marks
upon Dr. Lamb
being slain. See
Rush. Coll.
anno 1532.
vol. 8. cap. 1.
fol. 145.

Palm 104.

BETWEEN (a) Milborn and the inhabitants of the hundred of Dunmow, in Essex, it was adjudged, that for a robbery committed in the morning, *ante lucem*, the hundred shall not be charged, because the robbery was committed in the (b) night; and although no time be specified in the statute, yet by good exposition it doth not extend to a robbery committed in the night; for no laches or negligence can be imputed to the hundred for default of well-guarding the country in the night: also in the night they cannot make pursuit after the offenders, or inquire for them; and then to charge them, when they are deprived of their convenient means, would be very hard. And as it hath elsewhere been often said, it is a good exposition of a statute to expound it according to the reason of the common law. And at the common law, if a man be killed in a town by day, that is, so long as there is full day-light, and he who killed him escaped, the town where this felony was committed should be amerced for it; and so it is held in 21 E. 3. Coron. 288. *Cum quis felonice occisus fuit per diem, nisi felo captus fuit, tota villa illa oneretur*. And therewith agreeth also the said book in 3 E. 3. But if such murder or manslaughter be committed in the night, the town should not be amerced by the common law, because (as it hath been said) no laches or negligence can be imputed to the inhabitants of the town; and God hath appointed the day for men to labour, travel, and do their business, and the night to take their repose and rest, and therefore the prophet saith, *Posuisti tenebras, et facta est nox, in qua pertranseunt bestię sylvę, &c. sol oritur, et congregati sunt; exit homo ad opus et operationem, et redit vespere*: so savage beasts pass and repass in the night, and then men are at rest; and in the day men apply themselves to their labours and affairs, and then the beasts retire to their dens. And the poet saith, *Ut jugulent homines surgunt de nocte latrones*.

*And the common law is, men cannot (a) distrain for rent or service in the night, as it is adjudged in 12 E. 3. Distress 17. & 11 H. 7. 5. a. acc. But for a damage-feeſance a man may distrain in the night for the neceſſity of the caſe; for otherwiſe perhaps he ſhall not distrain at all; for before day they may be taken or ſtray out of his land: and therewith agreeth 10 E. 3. 21. And further it is provided by the ſaid ſtatute of Wincheſter, that in cities or great towns which are incloſed, the gates ought to be ſhut from ſunſet to ſunriſing; after which ſtatute, if in ſuch city or town incloſed any murder or manſlaughter be committed in the day or in the night, and the offender eſcapes, ſuch city or town ſhall be amerced. For now the act hath changed the reaſon of the law, and therefore the law itſelf is changed; for *ratio legis eſt anima legis, et mutata legis ratione, mutatur et lex*. For at the common law, if a man was killed in the night, as it hath been ſaid, there was not any fault in the city or town: but now if they do not keep their gates ſhut according to the ſtatute, by which the offender eſcapes, then there is fault and negligence in them; and therewith agreeth the book in 3 E. 3. Coron. 299. where the caſe is, it was preſented, that one killed another in the night; and it was aſked, where the felon was? And they ſaid that he is fled: and becauſe it was in the night, they ought not to be charged. Lowther Juſtice, who gave the rule, ſaid, that the town ſhould be ſhut by the ſtatute, from ſuch an hour: and becauſe the townſmen of the town took him not, all the town was amerced: alſo it was held on the ſaid act of 13 E. 1. that if divers commit a robbery, thoſe of the hundred ought to apprehend all the felons; for although they apprehend ſome of them, that ſhall not be ſufficient to excuſe them. For the words of the act of 13 E. 1. are, that they answer for the bodies of the offenders; which in conſtruction was taken, all the offenders. But now, by the ſtatute 27 Eliz. cap. 13. a new law is made, amongſt others, in theſe points following, viz. 1. That none ſhall have an action on the ſaid ſtatute unleſs the party robbed doth, ſo ſoon as he can, give notice of the ſaid felony to ſome of the inhabitants of ſome town, village, or hamlet next the place where the robbery was committed. 2. If they in their purſuit do apprehend any of the offenders, the ſame ſhall excuſe them, although they do not apprehend them all. See the act of 27 Eliz. cap. 13. which hath added to the ſaid ſtatute of Wincheſter, and altered the ſame in divers points.

[*Nota*, If a man was robbed on the Sabbath day, the country was chargeable, 2 Roll. Rep. 59. But by the ſtat. 29 Car. 2. it is enacted that the country ſhall not be chargeable.] Note to former edit. (A)

[* 7 a.]

(a) Co. Lit. 142. a. b. 152. in Edit. 1668 Dr. & Stud. fo. 75. a. 4 Leon. 218. Goldsb. 66. 9 Co. 66. a. 1 Roll. 672. Fitz. Avowry 137.

Styles 14.

Cro. Car. 290.

Cro. Car. 299.

1 Sid. 11.

2 Inst. 172, 173. 1 Sid. 11.

(A) This is confined to perſons who are travelling: for when the plaintiff was robbed in going to church on a Sunday, he recovered. *Taskmaker v. Hundred of Edmonton*, Com. Rep. 345. S. C. 1 Str. 406.

For what is neceſſary to be done to enable the party robbed to take advantage of the ſtatute, vide ſt. 3 Geo. 11. c. 16. 22 Geo. 2. c. 24. and the notes of Serj. Williams to *Pinkney v. Inhabitants de Rotel*, 2 Saund. 374.

[7 b.] *The EARL of BEDFORD's CASE,

Mich. 28 and 29 Eliz.

A. being seised of certain houses in tail, and of certain lands in fee held *in capite*, by deed indented made leases of the said houses whereof he was seised in tail rendering rent, and which leases were not warranted by stat. 32 H. 8. and died: the reversion descended to the heirs general of A., being two females; and it appeared that the leases were to have continuance after the said heirs general should be out of ward; and by office after the death of A. it was found that A. died seised of the said estate tail of the said houses, and that they descended to the said heirs general, by force whereof the said houses were seised into the Queen's hands.—Resolved, 1. That the King, in privity and right of the heirs in tail, should avoid the said leases during the time that they should be in ward.—2. That although the King, in the right of the heir, had avoided it for his time, yet it doth not avoid the leases so absolutely that the heirs in tail, after the King's interest determined, cannot make them good by acceptance of rent.

IN the Court of Wards, the case was, that Francis Earl of Bedford being seised of certain houses in the Strand, in the county of Middlesex in tail, *scil.* to him and the heirs of his body, and seised of other lands in fee held *in capite* (A), by deed indented, made leases of the said houses, whereof he was seised in tail, for twenty-one years, rendering rent (which leases were not warranted by the statute of 32 H. 8. but were voidable by the issues in tail), and died; the reversion descended to the heirs general of the Earl, that is to say, to two daughters and heirs of Henry Lord Russel, eldest son of the said Earl (which Henry died in the life of his father); and it appeared that the said leases were to have continuance after the said daughters should be out of ward: and by office after the death of the said Earl it was found that he died seised of the said estate-tail of the said houses, and that they descended to the said heirs general, by force whereof the said

(A) Tenure in knight's service, with all its oppressive fruits and consequences, as also those of socage *in capite*, abolished by stat. 12 Car. 2. c. 24.

houses were seised into the Queen's hands. And in this case two points were resolved: 1. That the (a) King, in privity and right of the heirs in tail, should avoid the said leases during the time that they should be in ward; as if a bishop makes a lease for years not warranted by the statute, so that the lease is voidable by the successor, and dies, the King shall avoid the lease (b) during the vacation of the bishopric, in privity and right of the bishopric; for the King in none of the said cases is as a stranger. And the same law is when a subject is guardian in knight's service: he, in the right of the heir within age, and in his ward, shall avoid voidable leases as to his own interest, but it shall not prejudice the heir of his election at full age; *for custos statum hæredis in custodiâ suâ existens meliorem, non deteriorem facere potest.* So if the heir within age before the entry of the guardian, or the ancestor being within age, makes a lease for years rendering rent, the (c) guardian may enter in the right of the heir, and shall avoid the lease. But the lord by (d) escheat shall not avoid voidable estates made by his tenant who was an infant; for regularly, none shall avoid voidable estates for infancy but *the infant himself or his heirs: but the guardian shall avoid the said voidable leases in the right of the infant himself, and so a difference; and the (a) King, in the case of a bishop, shall avoid the lease in the right of the bishopric, which continues although the bishop be dead. And that was one of the points adjudged in the Exchequer, in the great case between Austine and Sir J. Baker, 2 Mar. which I have seen, and which shall be related more at large in the resolutions of the second point of this case. *Vide* 16 Eliz. Dyer 337. b. patentee of Queen Elizabeth of lands given to a parson and his successors to superstitious uses, shall avoid after his death a lease for life (which is voidable by the successor) made by the parson, by the intent of the act of 1 Eliz. 6. of Chauntries. *Vide* 7 Eliz. Dyer 239 Hoskin's case. 2. It was resolved, that although the King in the right of the heir had avoided it for his time, yet it doth not avoid the leases so absolutely, that the heirs in tail after the King's interest determined, cannot make them good by the acceptance of the rent. For the King's act cannot determine the power and election of the issues in tail, or of the successor of the bishop in the case before put, to make the leases good by acceptance of the rent. And when voidable leases being void for a time shall be always avoided, and when not, this difference was taken and resolved by the court; *sc.* when the interest of him who makes the avoidance is but for part of the term, so that it appears that a residue remains; and when he who makes the avoidance avoids the whole interest, so that it appears that no residue can remain; and therefore, in the case at bar, it appears that after the King's interest determined, there remains a residue of the term. But if the patron of the church of D. doth grant the next avoidance to another, and afterwards and before the statute of 13 Eliz. the

the next avoidance to another; and afterwards and before 13 Eliz. the parson, patron, and ordinary, make a lease rendering rent; the parson dies, the grantee presents, &c.; the lease cannot stand against the successor.

1. The King in privity and right of the heirs in tail shall avoid the leases during the time they should be in ward.

(a) Palm. 437.

(b) Lit. Rep. 306.

Bac. Ab. Lease

(ii)

(c) 3 Bulst. 273.

Co. Lit. 215 b.

1 Roll. Rep.

402, 442.

The lord by escheat shall not avoid voidable estates made

[* 8 a.]

by his tenant

who was an infant;

but the

guardian shall.

(d) 4 Co. 124 a.

8 Co. 44 a.

Palm. 231. 254.

1 Roll. Rep.

401, 442. Br.

Entry Cong.

129.

3 Bulst. 272.

2 Inst. 483.

49 E. 3. 13 a.

(a) Lit. Rep. 306

29. Palm. 437.

2. The avoidance is not absolute.

(b) Palm. 437.

1 Co. 51 a.

Hob. 123, 243.

Dyer 337. pl. 38.

3 Leon. 158.

N. Benl. 125.

pl. 258. O. Benl.

Difference when the interest of the party avoiding is but for part of the term, and when he who makes the avoidance avoids the whole interest.

Patron grants

1 Jones 454.
Co. Lit. 46 a.
Hob. 7 Cro.
Car. 582. 1
Roll. 480.
Moor, 481.
2 E. 3. 8. per
Scrope.
Co. Lit. 46 b.

Co. Lit. 46 b.

Feme covert
levies a fine
[* 8 b.]
(as a feme
sole); if the
husband doth
not enter, the
wife and her
heirs are
bound: but by
the entry of
the husband
the whole es-
tate of the
conusee is de-
feated.
Hob. 225.
10 Co. 43 a.
Co. Lit. 46 a.
2 Roll. 20.
Touch. 7.
5 Roll. 20.
10 Co. 43 a.
Co. Lit. 46 a.
1 Jones 457.
Co. Lit. 46 a.
Plowd. 560. b.
Bridgm. 27.

Co. Lit. 46 a.

parson, patron, and ordinary, make a lease for years, rendering rent, and the parson dies, the grantee presents, who is admitted, instituted, and inducted, and dies, this lease was avoided in the whole absolutely; and therefore such lease cannot stand against the second successor, 2 E. 3. 8. (n). If an advowson of a church by licence be granted to a prior and his successors, and afterwards the same church is appropriated to him and his successors, so as they be perpetual parsons imparsones, in that case if the wife of the grantor be endowed of the advowson, and presents a clerk, who is admitted, instituted, and inducted, the appropriation is defeated for ever; for the whole estate of the parson imparsones is avoided: and so it was adjudged, as Sir Jeffery Scrope reports in 2 Eliz. 3. 8.; and in such sense is the book to be understood. For although the wife was endowed of the advowson, yet if she had died before any was admitted and instituted to the same church at her presentation, the church had remained appropriated; and so the *quare* in 6 Eliz. 6. 72. Dyer, is well resolved. So if a feme covert (as a feme sole) levies a fine by herself of land, whereof she is seised in fee to another and his heirs; in that *case if the husband doth not enter, that fine shall bind the wife and her heirs for ever; and, in the same case, if the husband enters and dies, the conusee shall not have the land; for by the entry of the husband the whole estate of the conusee was defeated, and the old estate of the wife revested in her, and the husband seised of the whole estate as in the right of his wife; and therewith agree 17 E. 3. 52. b. 17 Ass. pl. 17. 7 H. 4. 23. 2 R. 320. 9 H. 6. 33. But when only part of the estate or term is defeated, there it is otherwise, as in the said case between Austine and Sir J. Baker was adjudged; which case, as I myself have seen, in effect was:—Sir T. Wyatt was tenant in tail of the manor of East Forleigh in the county of Kent, *vis.* to him and to the heirs males of his body, of the gift of H. 8. to hold of him *in capite*, the reversion to the King, his heirs and successors. Sir Thomas Wyatt, by indenture, demised the said manor to Austine for twenty-six years, rendering 13*l.* rent to the said Sir Thomas and his heirs; and afterwards Sir Thomas died, and all this was found by office, and that Sir T. Wyatt was his son and heir male of full age, by which the King had *primer seisin* of the land itself, and for his interest did avoid the lease; and afterwards Sir Thomas the son sued livery, and accepted of the rent of Austine, and afterward committed high treason, for which he was attainted. In that case it was adjudged, that forasmuch as the King had avoided the lease, but as to his *primer seisin*, that after livery made it is in the election and power of the issue in tail, by acceptance of the rent to affirm the lease; because the lease was avoided by the King but for part of the term. So if tenant in tail takes a wife, and makes a lease for thirty or forty, &c. years, rendering rent,

(n) Adjudged accordingly, *Plowden v. Oldford*, Cro. Car. 582. But in *Hil.* 10 Eliz. C. B. C. 238, adjudged that the lease revived.

Phyldore Virgil's case, Hal MSS. (Harg. note (7) to Co. Litt. 46 a.)

which is avoidable by the issue in tail, and dies, and afterwards the wife recovers her dower, in that case the wife shall avoid the lease; and yet, if she dies within the term, the issue in tail at his election may either affirm or disaffirm the lease. And it was said, if tenant in tail makes a lease for thirty or forty years, rendering rent, which is avoidable by the issue in tail, and afterwards tenant in tail dies without issue, his wife with child with a son, by which the donor enters, and as to him avoids the lease, and afterwards the son is born, the lessee re-enters, the son at his full age may by acceptance of the rent affirm the lease; for the lease was never avoided absolutely, nor *simpliciter*, but *secundum quid*; and upon the matter *ex post facto* was defeated but for a time. And although *filius in utero matris, est pars viscerum matris*, (*vide* 3 Ass. pl. 2. 22 Ass. pl. 94. 22 *Edwardi Tertii, Corone* 180. Stamford 21.) yet the law in many cases hath consideration of him in respect of the apparent expectation of his *birth. See the opinion of Saunders and Browne in Stowel's case, Plowden's Commentaries for avoiding of a fine. *Vide temp. Eliz. 1. Gard. 153. and 31. Eliz. 1. Bre. 873.* for the wardship of him. *Vide* 38 E. 3. 7. and 41 E. 3. and 11 E. 3. Voucher, that he shall be (a) vouched in his mother's womb, 11 H. 6. 13. a devise of (b) land (devisable by custom) to one in his mother's womb (c), 41 E. 3. Detainment of (c) charters for the heir in his mother's womb, 3 El. Dy. 186. An adulterer doth counsel the woman to kill the child when he is born, who doth accordingly; the adulterer is accessory, yet at the time of the counsel the child was in his mother's womb. But it was said, for 30 years, rendering rent and marries, and dies without issue, his wife with child, the wife recovers dower, she shall not avoid the lease before the birth of the child. (a) 8 E. 2. Voucher 237. 1 Roll. Rep. 254. 31 E. 1. Br. 873. Cart. 87. 10 Co. 32 b. Co. Lit. 390 a. 9 H. 6. 24 a. 11 E. 3. Vouch. 13. 2 Roll. 746. Hob. 222, 338. (b) Dyer 303. pl. 51. 1 Sid. 153. Moor 637. Cart. 87. Raym. 83, 84. (c) 1 Roll. Rep. 254. 1 E. 3. 25 b. 3 Ass. pl. 2. 22 Ass. 94. et Fitz. Corone 263.

Godb. 325.

Strange. 360.

1 Leon. 74.

Cart. 87.

[* 9 a.]

Devise of land to one in his mother's womb.

Tenant in tail makes a lease

(c) A person devised to his brother Henry Clarke and his assigns, for his life, remainder to the use and behoof of all and every such child or children of his said brother as should be living at the time of his decease. H. C. died leaving several children, and his wife pregnant who was delivered seven months after of a daughter: held that the posthumous child, should take under this will; and it was observed by Lord C. J. Eyre that an infant *en ventre matris*, who by the course and order of nature was then living, came clearly within the description of children living at the time of his death. *Doe v. Clarke*, 2 H. Black. 399.

It was formerly disputed whether a devise to an infant *en ventre sa mere* was good or not; some held that it was not, whilst others contended that it was: but all agreed that a devise to an infant when he should be born was good. The objection to the devise being good was, that where an executory devise is limited *per verba de presenti*, that is, where the devisee is mentioned as a person

in existence, and the commencement of the estate devised is not expressly deferred to a future period, there the devisee must be a person capable at the death of the deviser, or otherwise the devise will be void; but it is now understood that this distinction between executory limitations *per verba de presenti* and *per verba de futuro* can affect those cases only, where there is not the least circumstance from which to collect the testator's intention of any thing else than an immediate devise to take effect *in presenti*. Fearn's Cont. Rem. 533. 7th Ed.

It is now clearly settled that a devise to an infant *en ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise, 1 Freem. 244. *per* North, C. J. Touch. 414. cont. And an infant *en ventre sa mere* is a life in being to all intents except in the case of a descent at common law. *Thelluson v. Woodford*, 4 Ves. 344. Vid. Bac. Ab. Infancy C. Vin. Ab. Devise I. 9.

(d) Co. Lit.
46 a. Bridg. 28.

if (d) tenant in tail makes a lease for 30 or 40 years, rendering rent, and afterwards takes a wife, and dies without issue, his wife with child with a son, and afterwards the wife recovers dower of the same land, she before the son's birth shall not avoid the lease, for her estate is *quodammodo* a continuance of part of the estate tail, and the same is proved by 10 E. 3. 26.

(e) Co. Lit.
241 a.

34 Ass. pl. 15. and 23 E. 3. Dower 150. that she shall be (e) attendant for third part of the services that tenant in tail did, which she should not be, if to all intents the estate tail were utterly extinct, and tenant in dower is *in* in the *per* by her husband, and *in* of his estate. *Vide* Litt. 93 b. in Descents, 38 Ass. 26. 7 H. 5. 3. 8 E. 2. Entre 75, &c. *Vide* 33 H.

(f) Dyer 51.
pl. 17. 1 Roll.
Rep. 216. 403.
3 Leon. 154.
Bridg. 27. 103.
Co. Lit. 349 a.
Moor 315.
2 Bulstr. 44.
45. 6 Co. 34 a.
7 Co. 13 b.

8. Dyer 51 b. (f) tenant in tail before the statute of 27 H. 8. of Uses, made a feoffment in fee to the use of him and his heirs; and also before the said act, he and his feoffees made a lease for years, rendering rent, and died after the statute, the land descended to his issue, who before entry upon the termor levied a fine to another; and by the better opinion of the Justices of both the benches, except Saunders, the alienee shall not avoid it; for although the son was remitted, yet the lease was not merely void, without actual entry by the issue. *Vide* Plow. Com. 437.

[* 9 b.]

UGHTRED'S CASE.

Trin. 33 Eliz.

In the Common Pleas.

UGHTRED.
v.
Marquis of
WINCHESTER.
Part VII.—9 a.

A. brought a writ of annuity against B., son and heir of C., and declared that C. 20th Dec. 17 Eliz. *tam pro affectione, &c. quam pro confidentiâ, &c. repositâ in eodem* A. by his writing did constitute A. captain of the fort and castle of N. for the life of the said A., and gave him authority to appoint a master gunner, &c. And further for the maintenance of A. and the master gunner, &c. for the defence of the castle, by the said writing did grant for him and his heirs to the said A. during his life an annuity of 32*l.*, &c. by force of which A. was seised of the office and annuity of his life. C. died 18 Eliz., and the defendant his son and heir for 11 years before the writ brought withheld the annuity, &c.; and upon special demurrer that it did not appear by the declaration that C. had power to grant the office, and that A. had not averred that he had exercised the office, nor that he did appoint a gunner.

&c. the Court of C. B. gave judgment for the plaintiff, and upon error brought that judgment was affirmed. And it was resolved that in all cases where an interest or estate commences upon a condition precedent, be the condition or act to be performed by the plaintiff or defendant or by any other, and be the condition in the affirmative or negative, the plaintiff ought to shew it in his declaration and aver the performance thereof. But when the interest or estate passeth presently, and vests in the grantee, and is to be defeated by matter *ex post facto* or condition subsequent, be the condition or act to be performed by the plaintiff, or by the defendant, or by any other, and be the condition in the affirmative or negative, the plaintiff may declare generally without shewing the performance thereof. S. C. Jenk. Cent. 260.

HENRY Ughtred, Esq. brought a writ of annuity against William Marquess of Winchester, son and heir of John Marquess Winchester, and declared that the said John Marquess of Winton, 20 Dec. 17 Eliz. *tam pro bona et favorabili affectione et benevolentia quas gessit erga eundem Henricum, quam pro confidentia et fidelitate repositi in eodem Henrico*, by his writing did constitute and authorize the said Henry to be captain of the fort or bulwark, and castle of Netley, *alias* Letley in the county of Southampton, to have and exercise the said office of captain, &c. during the life of the said Henry, and gave him authority during his life to nominate and appoint from time to time a master gunner, one porter, and six soldiers, &c. And further by the said writing the said John Marquess did grant, *pro consideratione prædicta, et pro meliore mantentione ipsius Henrici et magistri tormentor et sex militum in defensione et tuitione castri prædicti*, for him and his heirs, to the said Henry during his life, an annuity of 32*l.*, &c. at the feast of St. Michael, and the Annunciation of our Lady by equal portions, by force of which he was seised of the said office and of the said annuity for his life; and afterwards, 10th Nov. 18 Eliz. the said John Marquess died; and the defendant his son and heir for 11 years before the writ brought did withhold the annuity, which in all amounted to 368*l.*, &c. on which declaration the defendant did demur in law; and according to the statute did shew divers causes: 1. because it doth not appear by the declaration, that the said John Lord Marquess had power or interest to grant the said office; and also because the plaintiff hath not averred, that he hath exercised the said office, nor that he did appoint a master gunner, porter, or the soldiers, and divers other causes were shewed; but notwithstanding these, judgment was given by the Justices of the Common Pleas for the plaintiff, whereupon the Marquess brought a writ of error, and divers errors were assigned, but all were over-ruled by the Court but one. And that was, that the plaintiff in the writ of annuity had not averred in his declaration that he had exercised the said office, &c. But after many arguments and consideration of all the books, in which (as it seems *prima facie*) there is a diversity of opinions, it was resolved, that the declaration was good with-

Hard. 9. 79
2 Brownl. 98.
Doct. pl. 91.
1 Bulstr. 168.
Palm. 397.

27 El. cap. 5.
See the stat. 4
& 5 Annæ for
amendment of
the law.

[* 10 a.]

Resolution of
the Court and
the reason
thereof.

(a) Hard. 9.79.
Hob. 41. Jenk.
Cent. 260.
Doct. pl. 91.
21 E. 4. 49.
22 E. 4. 42.
(b) Doct. pl. 91.
Plowd. 30.
1 Lev. 274.
Hard. 9. 79.

(c) Doct. pl. 91.
(d) 5 Co. 78 b.
Plowd. 16 b.

9 E. 4. 20. per
Choke.

(e) Cro. Arg.
108. Hard. 9. 10.
2 Brownl. 98.
Doct. pl. 91.
Br. Count. 43.
Plowd. 25 b.
32 b. 272 b.
273 a. Palm.
192. Hob. 41.
Jones 328.

(f) Doct. pl.
91. 4 E. 3. 39.
pl. 60. per
[* 10 b.]
Wilby.

1 Salk. 171.
1 Sand. 319.

out such (a) averment; and their reason was, that in all cases where an interest or estate doth commence upon a condition precedent, be the condition or act to be performed by the plaintiff or defendant, or by any other; and be the condition in the (b) affirmative or negative, there, the plaintiff ought to shew it in his declaration, and to aver the performance thereof; for there, the interest or estate doth begin in him by the performance of the condition, and is not in him till the condition be performed. But otherwise it is when the interest or estate passeth presently and vests in the grantee, and is to be defeated by matter *ex post facto*, or condition subsequent, be the condition or act to be performed by the plaintiff or defendant or by any other, and be the condition in the affirmative or negative, there, the plaintiff may declare generally, without shewing the performance thereof, and it shall be pleaded by him who will take advantage (c) of the condition or matter *ex post facto*, for every one ought to allege that which (d) makes for him, and which is for his avail, and none shall be forced to allege that which is against himself. And, it may well be, that the condition subsequent or matter *ex post facto* stands upon many parts; (as in the case at bar it happens) to rehearse all which would be tedious, when issue shall be taken but upon one of them, and the defendant may plead any one of them which he pleaseth in bar of the action, and so the pleading will be more short and compendious, which is the most commendable, if it be sufficient. Here in the case at bar the condition was to be performed by the plaintiff himself, and therefore the case is the stronger: but because the plaintiff by the said grant was presently seised of the said office and annuity for the term of his life, which ought to be defeated by the not using the said office or other subsequent matter; the subsequent matter makes against him, and therefore shall be pleaded by the defendant, and therewith agreeth 15 H. 7. (e) 1 a. b. In a writ of annuity against the successor of a Prior on a grant made by his predecessor until he was advanced to a benefice of holy church, and the plaintiff declared generally, without saying that he is not yet advanced; and for that cause exception was taken to it, and notwithstanding the declaration was adjudged good, because the condition went in defeasance of the annuity, which ought to be shewed on the defendant's part. Also this is an annuity, which beginneth before the condition shall be performed, which performance shall come on the part of the grantor, and not like where the condition was (f), that if the grantee doth such a thing, that then he shall have such an annuity; now, if he will demand *it, he ought to allege *in facto*, that the condition is performed; for by the performance thereof the annuity doth begin. And so is the difference by all the Justices, and these are the words of the book. So it is said in Colthirst's case, Pl. Com. 25 b. If I grant to one that when he shall be promoted to a benefice, that he shall have an annuity; if he demands the annuity, he ought first to shew that he is promoted to a benefice. But if an annuity be granted to one until he be promoted to a benefice, there he

shall have a writ of annuity, and shall not shew that he is not yet promoted to a benefice, because the annuity doth precede, and the promotion is subsequent, and goes in defeasance of the annuity; and therefore it ought to be shewed on the contrary part. But when (a) a man is only entitled to an action, and the action lies not if the condition or consideration be not performed, there, the plaintiff in his declaration ought to shew the performance, for it amounts to a condition precedent, because the action arises on the condition or consideration performed, as the book in (b) 3 H. 6. 33 b. Suppose I retain (c) a man to go with me to Rome for 40s. here by the going the cause of the duty first arises, in which case, if he brings an action of debt for it, in his declaration he ought to declare, that he was there; otherwise the declaration shall abate. So it is if I (d) retain one to serve me for 40s., by the year; for here by the consideration performed the duty arises, so that it is in the nature of an act precedent and so, was the opinion of the whole Court in the said book. But the in (e) case 48 E. 3. 3. & 4. was affirmed for good law where it appears, that indentures were made between Sir R. Pool, Knt. of the one part, and Sir R. Tolcelser of the other part, by which Sir Ralph did covenant with Sir Richard to serve him with three esquires of arms in the wars of France, and Sir Richard did covenant therefore to pay him 42 marks: in that case each party had equal remedy, one for the service, and the other for the money; and therefore in debt for the 42 marks he may choose either to declare in general, or specially at his pleasure, by the rule of the Court (a). Also when an interest doth pass presently, and is to be defeated by matter *ex post facto*, yet if it appears to the Court by matter in law, that the action shall not be maintainable without shewing the performance of the condition or consideration, there, the plaintiff ought to aver it for the maintenance of his action, as in 39 H. 6. 21, 22. The case was, Richard Abbott of Chester granted to John Brewin, Esq. by his deed (without the consent of the convent) a yearly rent of 40s. out of his monastery, *pro consil' suo eid' R. abbati et (f) conventui ejusdem loci impenso, et imposterum impendendo*; the said R. Abbott died, and John Brewin brought a writ of annuity against the successor, and averred, that he had given to the said R. *nuper Abbati et conventui consil' suum apud W. in negot' domus præd' agendis, ad proficuum ejusd' domus*: and Prisot and the whole

(a) Doct. pl. 91. Lutw. 250, 251.

(b) Br. Count. 7. 22 E. 4. 29 a. Palm. 397. 1 Bulstr. 168.

Poph. 161.

Doct. pl. 91.

(c) Doct. pl. 91.

Popham

161. Jenk.

Cent. 260.

(d) Hob. 41.

106.

(e) Doct. pl. 92.

1 Bulstr. 168.

Popham 161.

Palm. 397, 398.

1 Roll. 414.

415. 1 Saund.

320. 1 Lev.

293.

(f) Doct. pl.

92.

(a) The report of the case 48 Ed. 3. & 4. in the text *supra* is incorrect. "The Report is this: Sir Richard Pool covenants with "Sir Ralph Tolcester to serve him with three "esquires in the wars of France; and Sir "Ralph covenants with him to pay so much "money for the service; and it was further agreed that half the money should "be paid in England on a certain day before they went for France, and the rest by "quarterly payments; and the case was determined upon the rule, that if a day be

"appointed for payment of money or part "of it, or for doing any other act, and the "day is to happen, or may happen, before "the thing which is the consideration of the "money or other act is to be performed, "an action may be brought for the money, "or for not doing such other act before "performance," Serjeant William's note *L. Fordage v. Cole*, 1 Saund. 320. where see fully what covenants are independent, and what dependent.

- [* 11 a.] *court held that the action was not maintainable against the successor without such (a) averment. For the action is not maintainable against the successor for any contract or grant made by the Abbot only without covent, unless the effect or consideration thereof comes to the profit of the house. And that such general averment was good; for it would be too long to show all the causes specially, and therefore against the successor he ought to take such averment. But in an action against the abbot himself, who made the grant, it is not necessary to take such averment, as it is agreed there by the whole Court. And so by these differences: 1. Between an interest, or estate vested, and which is to be divested by condition or matter subsequent, and a condition or matter which precedes the estate or interest. 2. Between a thing in action which in judgment of law is to commence on a condition or consideration precedent, and interests or estates which begin presently. 3. When equal remedy is given to both by reciprocal covenants. 4. When by matter apparent the plaintiff's action shall not be maintained without averment, although it be in the case of an estate or interest vested, you will the better understand your books, which seem *primâ facie* to disagree, (c) 21 E. 4. 39. or 49 b. 22 (d) E. 4. 43 a. 9 E. 4. 20. b. 37 H. 6. 8 b. 36 H. 6. 2 b. Dyer 10 El. 270. in *Avowry*, and 15 Eliz. Dyer 329 in *Debt*. And note, the said Ughtred had judgment in the Common Pleas,—*Quod prædictus Henricus recuperet versus præfatum nunc Marchionem, annuum redditum prædictum et arreragia ejusdem tamdiu ante diem impetrationis brevis original' ipsius Henrici, quam postea incursa, et damna sua occasione subtractionis annui redditus prædict' ad decem libras, eidem Henrico ex assensu suo per curiam hic adjudicat'. Quæ quidem arreragia et damna in toto se attingunt ad 402 libr. Et prædictus nunc Marchio in misericordia.*
- (a) Jenk. Cent. 260, 261. Doct. pl. 92.
- (b) Cr. El. 546. Doct. pl. 92.
- (c) Br. Count. 72 Br. annuity 38. Doct. pl. 90.
- (d) Hard. 10. Doct. pl. 90, 91.

ENGLEFIELD'S CASE.

[11 b.]

Mich. 33 & 34 Eliz.

In the Exchequer.

A. seised of a manor in fee, by indenture 18 Eliz. covenanted for the advancement of his blood, &c. to stand seised to the use of himself for life, and afterwards to the use of his nephew B. in tail, and afterwards to the use of his said nephew in fee; and it was covenanted in the indenture that because the nephew was an infant, and his proof not seen, in order to restrain him if after he should be prodigal, &c. it was provided that if the uncle by himself, or by any other, during his natural life, deliver or offer to the nephew a gold ring to the intent to make void the uses, then all the uses should be void. Hil. 26 Eliz. A. was indicted for treason. and outlawed; afterwards, 8 Aug. 28 Eliz. the Queen by patent under the great seal leased the land to C. and D. for forty years, and also demised for forty years *omnes et singulos boscos, subboscos, arbores, et terras boscales*; and afterwards, at the Parliament 29 Oct. 28 Eliz. the attainder was confirmed; and further it was enacted, that he should forfeit to the Queen all his manors, lands, &c. the day of the treason committed, or at any time after; and that the same should be in the actual possession of the Queen without office; but that the act should not extend to make void any lease of lands, &c. made by the Queen under the great seals, &c. after the treason committed; and by another act, made the same parliament, all persons claiming to have any estate or interest out of the lands of persons attainted since 18 Eliz. &c. made by persons attainted since 18 Eliz. &c. of treason in conspiring the Queen's death (as the said treason of A. was) were directed to exhibit their grants within two years in the Exchequer; and the same are directed to be entered and enrolled, &c. or else such grants, &c. to be deemed void. 17 Mar. 31 Eliz. the Queen, by her letters patent under the great seal, reciting the uses and the proviso of tendering a ring, &c. did depute E. and F. to make the tender to the nephew, to the intent to make void the uses; and that they should certify into the Exchequer what they did in the premises. E. and F. made the tender to B. the nephew (and read the patent to him); B. refused the tender; all which facts, with the patent, they certified into the Exchequer 19 Mar. 31 Eliz.: and the life of A. was averred; and in an information upon intrusion in the Exchequer against B., C., D., and others, which charged the defendants with cutting trees of elm and ash, and also underwood, judgment was given for the Queen. And it was resolved—1. That if the Queen, as tenant *pur autre vie*, makes a lease for forty years without any recital or mention of the estate for

REGINA
v.
ENGLEFIELD.

life, the lease is good : but if the Queen had granted an estate in tail or in fee, such grant would have been void. 2. That the Queen might take advantage of the condition in the covenant to stand seised; and that the proviso was well performed by the Queen's commission. 3. That the demise of the Queen was not a suspension of her condition, as in the case of a common person; for the demise of the Queen shall not enure to two intents. 4. That the tender and certificate were good; and that the party grieved, if it be false, might traverse the same. 4. That, at the time of the tender of the ring, the conveyance by covenant to stand seised was still in force; and, by consequence, also the condition. S. C. [1 And. 293. Poph. 18. Moore 303. 4 Leon. 135, 170.]

2 Roll. Rep. 142.
323, 324, 420.
Lane 44.
3 Keb. 316.
3 Inst. 19, 180.
Palm. 437, 438.
439.
Cases in Law
and Eq. 291.
Skin. 603, 604.
1 Mod. 16, 38.

2 Roll. Rep.
391.
1 Vent. 129.
Litch. 28.
Palm. 438.
1 Jones 136.

29 El. cap. 3.

BETWEEN the Queen and Margaret Englefield, Francis Englefield, and others, in an information upon intrusion in the Exchequer, which began Trin. 32 Eliz., the case in effect was such, Sir Fr. Englefield seised of the manor of Englefield in the county of Berks in fee, by indenture dated 2nd Jan. 18 Eliz. between him and the said Francis his nephew, covenanted for the advancement of his blood, &c. to stand seised to the use of himself for life, and afterwards to the use of his said nephew, and the heirs males of his body, and afterwards to the use of the right heirs of the nephew. And it was further contained in the same indenture, that because his nephew was an infant, so that his proof was not then seen, and because the uncle did not think convenient to settle the said inheritance in the nephew absolutely, so long as the uncle should live, without a bridle to restrain him if after he should be prodigal, or should be given to intolerable vices; for this cause it was provided, that if the uncle by himself, or by any other during his natural life, deliver or offer to the nephew a gold ring, to the intent to make void the uses, that then all the uses should be void. Hil. 26 El. Sir Francis was indicted in the King's Bench by a jury of Middlesex for treason committed at Nemures in *Hanonia in partibus transmarinis*, 20 Oct. 18 El. upon which indictment he was outlawed; and afterwards, 8 Aug. 28 Eliz. the Queen by patent under the great seal did lease the land to Foster and Fitton, two of the defendants, for forty years, and also demised to them for forty years *omnes et singulos boscos, subboscos, arbores, et terras boscales*: and afterwards at the Parliament 29 Oct. 28 Eliz. the attainder was confirmed. And further it was enacted, that he should be attainted of high treason, and should forfeit to the Queen all his manors, lands, tenements, &c. the day of the treason committed, or at any time after; and that the same should be in the actual possession of the Queen without office. But further it was provided by the said act, that nothing therein should extend to make void any lease of land, or gift of goods made by the Queen under the great seal, or Exchequer-seal, after the treason committed, &c. And at the same parliament another act was made, by which it was enacted, "That every person and persons which hath, or claim-

"eth to have any estate or interest, of, in, or out of any land
 "of any of the persons attainted since 18 Eliz. not *inrolled
 "of record, not certified into the Exchequer, made since 1
 "Eliz. by any of the persons attainted since 18 Eliz. of trea-
 "son, for conspiring of the Queen's death (as the said treason
 "of Sir Francis Englefield was) within two years after the
 "last day of this session of parliament, shall openly shew and
 "bring forth into the Queen's Majesty of the Court of Ex-
 "chequer, the same, his, or their grant, conveyance, and as-
 "surance, and there, in the term time, in open court, the same
 "shall offer and exhibit, or upon his or their oath affirming
 "that they have not the same, nor can come by it, or that it
 "was never put in writing, then the effect thereof to be en-
 "tered and inrolled of record, or else every such conveyance
 "and assurance should be void and of none effect to all intents
 "and purposes: saving to every person and persons (other
 "than parties and privies to such conveyance, and such as
 "shall not exhibit the said conveyance according to the true
 "meaning of this act) all such right, &c." And afterwards,
 17 Mar. 31 Eliz. the Queen, by her letters patent under the
 great seal, reciting the uses and the proviso of tendering of a
 ring, and that the benefit and advantage of the said condition
 is given to her by the statute of this realm, did depute, author-
 ise, and in her place and person put R. Broughton and H.
 Bouchier, jointly and severally to deliver or offer the ring of
 gold to Englefield the nephew, to the intent to make void the
 uses in the indentures; and that they should certify into the
 Exchequer what they should do in the premises. Broughton
 and Bouchier, 8 Mar. 31 Eliz. offer the ring (and read to him
 the patent) to the said Francis the nephew, which he refused:
 all which facts, with the patent, they certified into the Exche-
 quer 19 Mar. 31 El. and the life of Sir Fran. was averred, &c.
 And the defendants were charged for intrusion 20 Mar. 31 El.
 and with the cutting of certain trees of elm and ash, and cer-
 tain underwoods. And in this case, after many arguments at
 bar, and upon open argument at bench, these points were re-
 solved: 1. The Queen, as tenant *pur auter vie*, made a lease
 for forty years; although the Queen (having only an estate *pur
 autre vie*) could not absolutely contract for a lease for forty
 years, yet without any recital or mention of the estate for life,
 the lease is good: for the lease for years is in judgment of law
 less than the lease *pur autre vie*, and the Queen doth not any
 wrong or prejudice to any by the demise, and is not deceived
 in her grant; for in judgment of the law it is a lease for forty
 years, if *cestui que vie* shall so long live: but if the Queen had
 granted a greater estate than she lawfully might, as an estate
 in tail, or in fee, there because she could not lawfully do it, she
 was deceived, and by consequence her grant void. See now
 the case of Alton Woods, in the First Part of my Reports. (A)

[* 12 a.]

1. The case for
 forty years is
 good; altho'
 the Queen,
 having only an
 estate *pur au-
 ter vie*, could
 not absolutely
 contract for a
 lease for forty
 years.

Moor 321.
 O. Bridg. 204.
 If the Queen
 grants *totum
 statum suum*
 (having a term,
 or other partic-
 ular estate) it
 is good.

(A) Vid. as to the King's grants, Note (R. 2.) Alton Wood's case, Vol. I. p. 101.

[* 12 b.]
Objections to
the condition
going to the
Queen.

(a) 5 Co. 55. b.
1 Co. 44. b. 52
b. Dav. 75. a. b.
11 Co. 72 a.
2 Inst. 681.
Co. Lit. 19 b.
13 E. 4. 8 a.
Plowd. 246 b.
487 b. Cr. Ar-
gument 60.
1 Roll. Rep. 167.
Noy 182.
Moor 416.
Godb. 317.

(b) Vaugh. 180.
33 H. 6. 55 b.
7 Co. 33 b.
Calvin's case,
3 Co. 39 a.
Plowd. 294 a.
2 Inst. 234.
Br. Gard. 6.
Br. Forfeit. 70.
Co. Lit. 84 b.

Resolution.
The force and
effect of the
condition
consisted
in the tender
of the ring,
the rest was
not any parcel
of the proviso.

(c) 9 Co. 78. a. 79. a. 1 Roll. 455, 456. 2 Brownl. 131. 1 Roll. Rep. 296, 297. Cr. El. 46, 193, 304, 458. 3 Bulst. 148, 149. Co. Litt. 212 b. Perk. 145. b. 146 a. Hob. 178. Palm. 550.

And it was said, that if the Queen grants *totum statum suum* (having a term, or estate for life, extent, or other particular estate) it is good enough; for the *Queen doth not grant more than she may do by the law, nor doth any (a) wrong, or make any alteration of any estate by her grant. And it was objected that this condition should not be given to the Queen by the stat. of 32 H. 8. c. 20. for three reasons: 1. This condition is annexed to Sir Francis with such inseparable privity, that it cannot be given to another; for in this case the substance of the condition is the intent and mind of Sir Francis; but because his intent and mind cannot appear without an overt act, for this cause the ring shall be tendered as a declaration of his intent, which was inward and secret to himself, so that the tender of the ring is only the outward ceremony; but the substance of the condition is the mind and will of Sir Francis, which cannot be transferred to another. Also in this case nature is made judge; for the uncle is to judge of the quality and disposition of the nephew, and whether he gives his uncle cause to revoke or disannul his estate; and therefore as natural love and affection cannot be transferred to another, so this conveyance, of which natural love and affection is the cause of the creation of it, and the judge of the determination of it, cannot be revoked or determined by any other: and all this agrees with the reason of the common law; for the (b) wardship of the eldest son, which the law of nature gives the father, is inseparable, and cannot be forfeited or transferred to another, as it is agreed in 33 H. 6. And homage ancestral is inseparable, because it is annexed to the blood of the lord and the tenant. 2. By the general words of the act of 33 H. 8. conditions separable, and which may be performed by others, and not inseparable, are given to the King, as appears by divers cases founded on general acts of parliament here put, and after agreed. 3. It was objected, that this being a collateral condition, although the condition be given to the King, *sc.* the benefit of it, if it be performed, yet the performance is not given to the King by the said act; and therefore Sir Francis ought to tender the ring, and not the Queen. And therefore suppose that the condition had been, if the Chief Justice of England for the time being shall tender a ring after the attainder of Sir Francis, the Queen cannot tender it; and the reason of the books in 12 H. 4. 2. and 9 H. 7. 17. and 20. 4 H. 8. Dyer 1, &c. was urged, where collateral (c) conditions cannot be altered, and other things taken in satisfaction of them between the same parties, *a fortiori* here; for here the person who by express words ought to perform the condition shall be changed. As to the first and second objections, Manwood Chief Baron, and the whole Court held, that the whole force and effect of the condition in the case at bar did consist on the tender of the ring; and the other matter of the reason and cause which moved and induced him to leave the said power

and bridle in himself was not any parcel of the proviso, but a (d) flourish (as he termed it) and preamble, and nothing is parcel of the condition but that which comes after the *proviso, and that is the tender of the ring. And as to that, the said difference was taken and agreed by the whole court, *scil.* between conditions which are personal and individual, and cannot be performed by any other; and conditions which are not so inseparably annexed to the person but that they may be performed by any other; as it was resolved in the case of Thomas Duke of (a) Norfolk, who in anno 11 Eliz. conveyed his lands to the use of himself for life, and afterwards to the use of Philip Earl of Arundel his eldest son in tail, with divers remainders over, with proviso, that if he should be minded to alter and revoke the said uses, and should signify his mind in writing under his proper hand and seal, and subscribed by three credible witnesses, that then, &c. And afterwards the said duke was attainted of high treason, that this proviso or condition was not given to the Queen by the said act of 33 H. 8. because the performance of it was (b) personal and inseparably annexed to his person, that is to say, to signify his mind by writing under his own proper hand, which none could do but the duke himself; upon which point all the possessions of the dukedom so conveyed *ut supra* were saved, and not forfeited by the attainder, 35 H. 6. 56. The Templars held divers of their possessions in (c) frankalmoign (which tenure as Littleton saith, is annexed in privity to the blood of the donor), and afterwards they were dissolved, and by Parliament, anno 17 Ed. 2. their possessions were given to the Hospitallers, to hold them in the same manner as the templars held, yet they by those general words should not hold in *frankalmoign*, because the privity of the tenure on the part of the tenant doth not continue; and this privity being personal and inseparable, by the general words of the act, was not transferred to the Hospitallers. The same law of an impropriation of a church, which also is an incident inseparable to the religious house to which the church is impropriate. And therefore it is adjudged in P. Ed. 3. (d) that the Hospitallers by the said act of 17 Ed. 2. should not have the impropriation, for it was inseparably annexed to the corporation of Templars, which thing consisting in inseparable privity by general words of an act of Parliament should not be transferred to others. So was it adjudged Trin. 25 Eliz. in the Marquess of Winchester's case, (which see in the Third Part of my Reports 2.) that by the general words of all hereditaments, &c. a writ of (e) error which a person attainted had was not given to the King for a writ of error is a writ which lieth in privity. And the Chief Baron said, that he never saw in any act of attainder (f) actions which belonged to the attainted given to the King. In the time of H. 8. Br. Corodie 3. it is held, that a (g) foundryship, which also is a thing annexed inseparably to the blood of the founder, should not be forfeited by attainder, *vide* L. 5 El. 389. Owen 21. 3 Co. 2 a 3 b. 1 Jones 77. (f) Hob. 341. 2 Roll. R. p. 325. 420. 501. (g) Co. Lit. 99 a. b. Moor. 322. 4 Leon. 133. 11 Co. 77 b.

(d) Latch. 71.

Palm. 435.

Q. de hoc.

[* 13 a.]

Difference between conditions personal and individual, and which cannot be performed by any other, and conditions which may be performed by any other, and instances thereof.

(a) Latch. 107.

1 Mod. Rep.

17, 38, 40.

Hob. 343. 1

Vent. 12. 2

Roll. Rep. 391.

394. Latch.

27, 29, 70, 71.

103. Palm.

435. O. Benl.

139. 1 Jones

77, 235, 739.

Styles 196.

(b) Palm. 119.

(c) Latch. 69.

71. Lit. sect.

141. Co. Lit.

99 a. 3 Co. 3 b.

Moor

312, 322. 35

H. 6. 56 b. 57

a. Moor 163.

(d) 3 E. 3. 11

b. pl. 1. 3 Co.

3 b. Moor

530, 531.

Fitz. Grants

70. Plowd. 501.

Leon. 17.

(e) 4 Leon. 17.

173, 174.

Moor. 323.

Latch. 30, 69.

O. Benl. 139.

2 Roll. Rep.

319, 324, 374.

1 Leon. Rep.

371, 372.

Moor 125. Lit.

Rep. 100. Cro.

p. 325. 420. 501.

† Q.
[* 13 b.]

Resolved.
The condition
being given to
the Queen,
the perform-
ance thereof
is also given
to her.

Objection that
the lease
should not be
void, for the
life estate was
not subject to
the condition.
(a) Co. Lit. 272
b. 1 Co. 121 a.
1 Mod. Rep.
39. 1 Anders.
318. Plowd.
352 b. Poph.
71.

† 27 H. 8. cap.
10.

(b) 13 Co. 56.

(c) 2 Roll. 785.
Plowd. 309 b.

* [14 a.]

Ed. 4. † But in the case at bar, the condition, *scil.* the tender of the *ring is not annexed to the person of Sir Francis, but any other may do it as well as himself. The same law of payment of money, delivery of gold spurs, or other like. As to the third objection it was resolved, that when the statute gives the condition to the Queen, that the performance thereof, (which is not personal and inseparable) is also given to the Queen as incident to it: for the performance is the substance and the effect of the condition; and the statute puts the King in the place of the person attainted, to do *that* for the performance of the condition, which is feasible, and which is not inseparably annexed to the person of him who is attainted. 4. It was objected, that although the condition should be given to the Queen, and the performance of it also, yet the lease should not be void, for the estate for life of Sir Francis was not subject to the condition. For an (a) use at the common law was a trust and confidence reposed in one person, that another person should have the profits, so that there ought to be a separation of the possession and of the use, either by covenant, or feoffment, fine, or other conveyance, by which there is a transmutation of the possession: but in our case he himself stood seised to the use of himself for life, which could not be as an use, for he himself is terre-tenant, and there is not any separation of the possession, and it is not any trust or confidence, and he could not have a *subpcena* against himself before the statute; and the stat. of † 27 H. 8. doth execute the possession to him only who hath an use, and who had not a possession before: but Sir Francis in our case had the possession before, and therefore the statute cannot give possession to him, but his estate for life was parcel of his old estate. And note, the statute of 27 H. 8. saith, to the use of (b) another person, &c. so that another person ought to have the use, than he who hath the possession. And *vide* 30 H. 8. Feoffments al Uses Br. 47. *Cestui que use* in tail before the stat. was enfeoffed by the feoffees; and afterwards the stat. of 27 H. 8. was made, the statute shall not give him a possession in tail according to the use, because he had the possession before, because there was not any separation of the use and possession at the time of the making of the statute. And then if the estate for life be parcel of his old estate, it is not subject to the said proviso or condition, and by consequence by the performance of the condition the estate for life is not defeated, and then the lease for 40 years, which is derived out of it, remains good. But it was resolved by the Court, that Sir Francis had the estate for life by the limitation of the use, and the operation of the statute of 27 H. 8. And they much relied upon the reason and rule of Baynton's case, in Plow. Com. that a man for the advancement (c) of his heirs males, may covenant to stand seised to the use of himself and the heirs of his body, in that case there is no separation of the possession and use, and yet *the statute doth create an estate in tail in possession in him, in which case the whole estate-tail is in himself: but that is for the benefit of the heir male, although he is *in futuro*, and not *in presenti*,

none can know who shall be his heir male, for (a) *Solus Deus facit hæredes, non homo*. But in this case it is for the benefit of the nephew *in presenti* to have the uses raised according to the said indentures. 5. It was objected, that although the estate for life be defeated by the condition, yet the Queen should not avoid her own lease; for when the Queen hath an estate for the life of another, and also a condition in her by the statute of 33 H. 8. and she makes a lease for years, although the Queen doth perform the condition, she shall not avoid the lease. As if in such case a common person had had the estate for life, and the Queen the condition, and the common person had made a lease of the land, and the Queen had confirmed it, and afterwards the condition is performed, yet the (b) lease is good. And if mortgagee makes a lease for years, and the mortgagor confirms it, and afterwards the condition is performed, the lease shall not be avoided. And Arden's case was cited. Tenant in (c) tail makes a lease for life now he hath gained a new fee by wrong, and afterwards he grants a rent-charge or makes a lease for years, and afterwards tenant for life dies, he shall not avoid his charge or lease although he be *in* of another estate, because he had a defeasible possession, and ancient right, the which, if they be in several hands, should be good; as the lease of one and the confirmation of the other, and being in one hand shall be as much in judgment in law. Note, the lease is the stronger case than the charge, 11 H. 7. 21 a. Edrich tenant in tail made a feoffment to his use upon condition, and afterwards upon his recognizance the land is extended by the stat. of 1 R. (d) 3. and afterwards he performed the condition, yet the interest of the conusee shall not be avoided, and yet the estate is changed *causâ quâ supra*. And all that was affirmed by the Court. But as to that it was resolved, that the demise of the Queen should not enure (to her special prejudice) to (e) two intents, *scil.* to a demise of the land, and also to a suspension of her condition, by which she might defeat the estate for life, and the other estates as it should in the case of a common person, or to a demise in respect of her present estate for the life of another, and also to a confirmation in respect of her condition: by which otherwise she might defeat the whole, as should be also in the case of a common person. For the grant of the Queen shall be taken according to her express intention comprehended in her grant, and shall not extend to any other thing by construction * or implication, which doth not appear by her grant that her intent did extend to. And therefore in such cases the Queen ought to be truly informed, and she ought to make a special and particular grant, which by express words may enure to all such several intents as are desired; as 17 E. 3. 39. An advowson held of the King is aliened to an Abbot; now the King hath title to the advowson for the mortmain, and afterwards the King by his letters patent grants to the Abbot that he may hold the advowson to his own use, yet he shall not lose the advantage of the mortmain, for when the King hath two rights in him, he cannot exclude himself of

(a) Roll. 785.
Co. Lit. 7 b.
21. 56. 4.

Objection,
that if the estate for life be defeated by the condition yet the Queen cannot avoid her own lease.

Co Lit. 301 a.

(b) Moor 325.
2 Roll. Rep.
320, 340, Godb.
311, 314, 323.
Tenant in tail makes a lease for life, and afterwards grants a rent charge or makes a lease for years, and afterwards tenant for life dies, he shall not avoid his charge or lease.

Resolution.
The demise of the Queen shall not enure (to her special prejudice) to two intents, *scil.* to a demise of the land, and to a suspension of her condition.
(c) Moor 325.
Poph. 50. 1
Co. 147 b. Co.
Lit. 343 a.
[* 14 b.]
349 a. Br.
Condition 249.
2 Roll. Rep.
320.
(d) 1 R. 3. c. 1.
1 Co. 147. a.
(e) Lane 121.
Poph. 150 b.
5 Co. 56 a.

both without special words. *Vide* 9 H. 7. 14. Plow. Com. 397, &c. And if in this case the demise of the Queen should amount to a confirmation by force of her condition, or if the demise should amount to a suspension of the condition, then upon that it would follow, that she during the term could not perform the condition, which would be very prejudicial to the Queen. 6. And as to the said tender by force of the said letters patent, and the certificate thereof into the Exchequer, it was objected, that the same would not be sufficient, but the tender ought to be found by office, for although the letters patent are of record, yet the tender itself is matter in fact, which ought to be found by office; for the certificate of the bishop by force of the King's writ, or of the Marshal of the King's host, as in 2 Ed. 4. 1. which and such like are not traversable, but are trials in law, and shall bind the parties. But in our case if this certificate, which is not made upon any ordinary course of proceeding, should be good in law, it would be a great prejudice to the party; for no certificate, which is allowed and warranted by the common law, is traversable; and then the matter might be false and the party disinherited, and yet he should not have any remedy, which would be very inconvenient. But it was resolved by the whole Court, that the tender and certificate in this case was good enough, and that the party grieved, if it be false, might traverse the same, and should not be concluded by it; for it was not in the nature of a trial, but of a record to inform and satisfy the Queen of her title. Also they resolved, that presently by the tender of the ring according to the said proviso, or condition, the uses were determined and void in law, and by consequence the land vested in the Queen by force of the attainder, and of the act of 33 H. 8. 7. It was objected, that the said conveyance was void by the act of 28 El. and then was Sir Francis at the time of his treason committed, and attainder thereupon, seised of the said lands in fee, which were *forfeited to the Queen, and vested in her by the said act of 33 H. 8. and by consequence, the said lease made by the Queen (being at the time of the making thereof seised in fee) is good. And to prove that the conveyance was void by the statute before the said tender of the ring, so that the estate was not defeated by the condition, but the conveyance in which the condition was contained made void by the act of 28 El. before the said tender of the ring, and before the lease made; the words of the statute are, that every person, &c. "within two years after the last day of that session, shall openly shew and bring forth into the Exchequer his conveyance, and there in the term-time in open court shall exhibit, &c. the same to be entered and inrolled of record, &c." And the tender of the ring was the 18 Mart. anno 31. before which day all the terms in the two years were past; so that after Hilary term past anno 31. it was not possible that the conveyance should be inrolled within the two years in open court in term-time. For the two years passed by effluxion of time before Easter term; and therefore presently after Hilary term passed, the conveyance was void; and by consequence the condition

Doct. pl. 352.
370. See Co.
Lit. 74 a.

Latch. 71.
Moor 335.
Doct. pl. 352.
370.
Resolution.
The tender and
certificate are
good enough;
and the party
grieved if it
be false, may
traverse the
same.
Resolution.
At the time of
the tender of
the ring, the
condition was
in force.
33 H. 8. c. 20.

[* 15 a.]

Moor 446.

also. And thereupon the case in Temp. E. 1. Covenant 29. and F. N. B. was put, that although the covenant be, that he leave the wood in as good plight, &c. at the end of the term, if the lessee cuts down the trees, the lessor shall presently have an action of covenant, for it is not possible that he leave the trees, &c. at the end of the term, so that the impossibility of the act shall give a present action upon a future covenant (a). But it was resolved by the Court, that at the time of the tender of the ring the said conveyance, and by consequence the condition, was in force. And their reason was, because the statute doth not require that the inrolment of the conveyance, which is the act of the Court, should be within the two years; but the shewing and exhibiting thereof, which is the act of the party, ought to be within the two years: for as to the shewing and exhibiting of the conveyance, the words are ("within two years, &c. shall, &c. there in the term-time in open Court "exhibit the same"); then the next words following are, ("to "be entered and enrolled of record") so that no time is limited when it shall be enrolled. But if the words had been, ("and "then and there shall be entered and inrolled of record") then the conveyance ought to have been enrolled within the two years: but as the words are, it may be enrolled after the two years past. And this was the first case (that I know) that was argued and adjudged on the said act of 33 H. 8. which gives conditions of persons attainted of treason to the King. And in the argument of this case, the case of T. Markenfield, Esq. *an.* 19 El. in the Excheq. and divers other cases of persons attainted of treason, who had power of revocation were cited: *and on consideration of them by the Barons, they resolved *ut supra*, and gave judgment for the Queen. But the counsel of Francis Englefield were not satisfied with the judgment, and chiefly as to this principal point: for they conceived, that as this case is, the condition was so inseparably annexed to the person of Sir Francis, that it was not given to the Queen by the said act of 33 H. 8. And their advice was to bring a writ of error. But at the next Parliament, *scil.* 35 Eliz. a special act of Parliament was made to establish the forfeiture to the Queen (c).

5 Co. 21 a.
F. N. B. 145 k;
Moor 313, 323.
2 Roll. Rep,
332, 347.
Godb. 335.

Resolution. At the time of the tender of the ring, the condition was in force.

[* 15 b.]

(a) Vid. note, (B.) Anthony Main's case, Vol. III. p. 40.

(c) If the condition be such as that the substance of the performance thereof is not bound up strictly to the person attaint, then such a condition is given to the crown, and the King may perform it as the party himself might have done, in case the condition hath a continuance, 1 H. P. C. 244. Suppose Sir Francis had died before the Queen had made the tender, then the condition which was only limited to him during his life had been determined; and the Queen could not have tendered, for the attainder could not lengthen the condition longer than the first

limitation; but, on the other side, if the condition be appropriated and applied to the person of the party attaint, then such condition is not given to the crown. *Per* Lord Hale, 1 H. P. C. 245.

In *Dacre's case*, cited by Popham, 4 Leo. 169, where the grant was revocable upon a mere tender of 5s., it was resolved that such a condition was given to the King.

In *Hardwin v. Warner*, Latch 25, 69, 102. 1 Jones 134. Palm. 429. 2 Roll. 393. a power of revocation was given to Sir William Shelley upon tender to the feoffees of a gold ring or a pair of gloves of the value of 12d., or above, or the sum of 12d., he

the said Sir William, *tunc declarante et expressante*, that the tender was with intent to make void the feoffment. The attorney-general confessed judgment in the Exchequer. In the Common Pleas it was adjudged, that this condition was so personal, that it was not given to the King: but upon a writ of error to K. B., Lord Hale states, P. C. 246. that the Court was divided. Palmer states, that three judges were of opinion, that the power was inseparably annexed to Sir William's person; the judgment of C. B. was of course confirmed.

Where the power is required to be executed under the proper hand, or which is the same under the hand of the donee, the power is appropriate to the person, and is not forfeited by his attainder. *Smith v. Wheeler*, 1 Vent. 128. 1 Lev. 279. 1 Mod. 16, 38. 2 Keb. 564, 608, 644, 763, 772. Also when the condition is given to the crown till the condition is performed, nothing but the condition is in the King, and by a general grant of the subject matter to which the condition is annexed, before the performance of the condition, neither the power of performing the condition, nor the benefit of the condition, when performed, passes to the grantee; and if the condition is granted by the crown, and might by the crown be transferred to the patentee; yet it seems that the patentee could not transfer

or assign that condition over to another. 1 H. P. C. 247.

Where the King's debtor has a power of revocation for his own benefit, whatever are the ceremonies required to its execution, and although such debtor die without executing the power, the land may be extended for the debt by virtue of the King's prerogative. Sir Ed. Coke's Case, 2 Rolle, 294. Godb. 289.

So where the donee of a power of revocation commits a contempt against the King's prerogative, the lands may be seized in the same manner as if he had executed the power for his own benefit. Thus where a man, having a power to revoke a settlement, went abroad, and the King sent his privy seal to him requiring him to return into the realm, which he refused to do; upon oath of the fact made by the messenger, by whom the privy seal was sent: process was issued against the terre-tenants, and judgment was given that they should forfeit the lands for the contempt; (Sir R. Dudley's case cited 2 Roll. 304). Sir W. de Britain's case cited, Dy. 128 b. pl. 61. Sir Francis Knole's case, Dy. 375 b. pl. 21. Bac. Ab. Prer. C. 4. that is, till the return of the person committing the contempt, when he is liable to fine and imprisonment, Sugden on Powers 184. 3rd edition.

THE CASE OF SWANS.

Trin. 34 Eliz.

QUEEN
v.
LADY JOAN
YOUNG.
Pt. VII.—15 b.

A prescription to have all wild swans, which are *fera natura*, and not marked, building their nests, breeding, and frequenting within a particular creek, is not good.

All white swans not marked, having gained their natural liberty, and swimming in an open and common river, may be seized to the King's use by his prerogative.

A swan is a royal fowl, and whales and sturgeons are royal fish.

Every one who hath swans within his private waters hath a property in them.

A man may prescribe to have a game of swans within his manor, and may prescribe that his swans may swim within the manor of another.

A swan may be an estray.

Cygnets belong equally to the owner of the cock and the owner of the hen, and shall be divided betwixt them.

BETWEEN the Queen, and the Lady Joan Young, late the wife of Sir John Young, knight, deceased, and Thomas Saunger, defendants, the case was such: an office was found at W., in the county of Dorset, 18th of September ann. 32 El. before Sir Matthew Arundel and other commissioners of the Queen under the great seal, *Quod a villā de Abbotsbury, in præd' com' Dorset, usque ad mare per insulam de Portland in eodem com' est quædam æstuaria, Anglicè a mere or fleet, in quam mare fluit et refluit, in qua quidem æstuaria sunt 500 cigni: quorum 410 sunt albi, et 90 sunt cignetti, et quod omnes prædicti cigni et cignetti sunt in possessione J. Young et Tho. Saunger, et quod quilibet eorum est valoris 2s. 6d. quodque major pars tempore captionis dictæ inquisitionis minime fuer' signal'*: which office being certified into the Exchequer, a writ was directed to the Sheriff of the same county to seise all the said white swans not marked, by force whereof the Sheriff returned that he had seised four hundred white swans, to which afterwards, *scil. Hilary 34 Eliz.* the said *Joan Young and Tho. Saunger pleaded; *Quod præd' æstuaria sive aqua, jacet in paroch' de Abbotsbury in com. Dorset* (and abutted it), and that before the inquisition taken, the Abbot of Abbotsbury was seised *de præd' æstuaria, et de ripis et solo ejusdem* in fee, and that at the time of the inquisition, and time out of mind, *fuit et adhuc est quidam volatus cignorum et cignellor' feror', vocal' a game of wild swans, in æstuaria sive aqua illa, et ripis, et solo ejusdem nidificant', gignent' et frequentant' Anglice haunting, de quo quidem volatu cignor' et cignellor', præd' Abbas et omnes prædecessores sui Abbates monasterii præd', per totum tempus prædict' habuere et gavisii fuerunt, et habere et gaudere consueverunt, tot' profic' et increment' omnium et singulor' cignor' et cignellor' feror', in æstuaria præd' nidificant', gignent' et frequent' qui quidem cigni et cignetti per totum tempus præd' fuerunt feræ naturæ, et infra idem tempus iidem cigni et cignetti seu eorum aliqui aliquo signo non usi fuissent, nec consuevisent signari, nisi quod præd' nuper Abbas et prædecessores sui præd' per totum tempus præd' ad eorum libitum quosd' seu aliquos de minorib' cignettis annuatim pullulant' quos ad usum et culinæ et hospitalitatis suæ statuerunt expendend', in hunc modum annuatim signare consueverunt, et usi fuerunt, viz. amputare mediam juncturam unius alæ, Angl' to cut off the pinion of one wing, cujuslibet talis cignetti, eâ intentione, quod cignetti sic amputati minime valerent avolare.* And afterwards the said Abbot surrendered the premises to King H. 8. who anno 35th of his reign granted to Giles (a) Strangways, Esq. (a) Dav. 57. 8. by his letters patent *inter alia, totam illam liberam piscariam nostr' in aqua, vocal' the fleet in Abbotsbury præd', ac omnia messuag', aquas, piscat' et cætera hæreditam' nostr' quæcunque in Abbotsbury, in dict' com' Dorset dict' nuper monasterio, &c. adeo plene et integre, &c. et in tam amplis modo et formâ, &c.* and that the said Giles died, and it descended to Giles Strangways his cousin and heir, who demised to the defendants the said game of swans for one year, &c. and prayed *quod manus*

[* 16 a.]

dictæ dominæ Regine amoveantur. Upon which the Queen's Attorney did demur in the law.

All white swans not marked, having gained their natural liberty, and swimming in a common river, may be seized to the King's use; whales and sturgeons are royal fish, [* 16 b.] and belong to the King by his prerogative.
(b) Dav. 56 a.
Stamf. Prærog. 37 b. 38 a.
5 Co. 108 b.
Plowd. 315 b.

1. It was resolved, that all white swans not marked, which having gained their natural liberty, and are swimming in an open and common river, might be seized to the King's use by his prerogative, because *volatilia (quæ sunt feræ naturæ) alia sunt regalia, alia communia*: and so *aquatilium, alia sunt regalia, alia communia*: as a swan is a royal fowl; and all those, the property whereof is not known, do belong to the King by his prerogative: and so (b) whales and sturgeons are royal fish, and belong to the King by his prerogative. And there hath been an ancient officer of the King's, called *Magister deductus cignorum*, *which continues to this day. But it was resolved also, that the subject might have property in white swans not marked, as some may have swans not marked in his private waters, the property of which belongs to him, and not to the King; and if they escape out of his private waters into an open and common river, he may bring them back and take them again. And therewith agreeth Bracton, *lib. 2. c. 1. fol. 9. Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant, (ut sunt cervi, cigni, pavones, et columbæ, et hujusmodi) eousque nostra intelligentur quamdiu habuerint animum revertendi.* But if they have gained their natural liberty, and are swimming in open and common rivers, the King's officer may seize them in the open and common river for the King: for one white swan, without such pursuit as aforesaid, cannot be known from another; and when the property of a swan cannot be known, the same being of its nature a fowl royal, doth belong to the King; and in this case the book of 7 H. 6. 27 b. was vouched, where Sir John Tiptoft brought an action of trespass for wrongful taking of his swans; the defendant pleaded that he was seized of the lordship of S. within which lordship all those whose estate he hath in the said lordship had had time out of mind all estrays being within the said manor; and we say, that the said swans were estraying at the time in the place where, &c., and we as landlords did seize and make proclamations in fairs and markets; and so soon as we had notice that they were your swans, we delivered them to you at such a place. The plaintiff replied, that he was seized of the manor of B. joining to the lordship of S.; and we say, that we and our ancestors, and all those, &c. have used time out of mind to have swans swimming through all the lordship of S., and we say, that long time before the taking we put them in there, and gave notice of them to the defendant that they were our swans; and prayed his damages. And the opinion of Strange there was well approved by the Court, that the replication was good: for when the plaintiff may lawfully put his swans there, they cannot be estrays, no more than the cattle of any can be estrays in such place where they ought to have common; because they are there where the owner hath an interest to put them, and in which place they may be without negligence or laches of the owner. Out of which case, these points were observed con-

Fitz. Barr. 6.
r. Estray 3.

cerning swans. 1. That every one who hath swans within his manor, that is to say, within his private waters, hath a property in them; for the writ of trespass was of wrongful taking his swans, *scil. Quare cignos suos, &c.* 2. That one may prescribe to have a game of swans within his manor, as well as a warren, or park. 3. That he who hath such a game of swans may prescribe, that his swans may swim within the manor of (a) another. 4. That a swan may be an estray, and so cannot any other fowl, as I have read in any book. In (b) 2 R. 3. 15 b. & 16 a. the Lord Strange and Sir John Charlton brought an action of trespass against three, because the defendants had taken and carried away 40 cygnets of the plaintiff's in the county of Bucks, to his damages of 10*l.* One of the defendants pleaded, that the water of the Thames ran through the whole realm, and that the county of Buckingham is adjoining to the Thames; and that the custom of the said county of Buckingham is, and hath been time out of mind, that every swan (for cignet in the book is taken for a swan) which hath its course in any water, which water runs to the Thames within the same county: that if any swan comes on the land of any man, and there builds, and hath cignets on the same land, that then he who hath the property of the swan shall have two of the cignets, and he who hath the land shall have the third cignet, which shall be of less value than the other two; and that was adjudged a good custom, because the possessor of the land suffers them to build there, where he may drive them off. And by this judgment it also appears, that a man may allege a custom or prescribe in swans or cignets. And in the same case it is said, that the truth of the matter was, that the Lord Strange had certain swans which were cocks, and Sir John Charleton certain swans which were hens, and they had cignets between them; and for these cignets the owners did join in one action, for in such case by the general custom of the realm, which is the common law in such case, the cignets do belong to both the owners in common equally, *sc.* to the owner of the cock, and the owner of the hen; and the cignets shall be divided betwixt them. And the law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies; upon which the poet saith;

*Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui, &c.*

And therefore this case of the swan doth differ from the case of kine, or other brute beasts. *Vide* 7 Hen. 4. 9. And it was agreed that none can have a swan mark, which in Latin is called (*cigninota*) unless it be by the grant of the King, or of his officers authorised thereto, or by prescription. And if he

Every one who hath swans within his private waters hath a property in them. A man may prescribe to have a game of

[* 17 a.] swans within his manor, and may prescribe that his swans may swim within the manor of another. A swan may be an estray. 3 Keb. 315.

(a) 3 Keb. 273.
(b) Cr. 11. 275.

Cro. El. 725.

Cygnets belong equally to the owner of the cock and the owner of the hen.

None can have a swan mark but by grant of the King or by prescription, and the grantee must have an

estate of freehold of the yearly value of five marks.

[* 17 b.]

hath a lawful swan mark, and hath swans swimming in open and common rivers lawfully marked therewith, they belong to him *ratione privilegii*. But none shall have a swan mark, or game of swans, unless he hath lands or tenements of an estate of freehold of the yearly value of five marks, above all charges, on pain of forfeiture of his swans, whereof the King shall have one moiety, and he who seises shall have the other moiety: and that is by the stat. of 22 Ed. 4. cap. 6. And he who hath such swan-mark may grant it over. And thereof I have seen a notable precedent in the time of H. 6. which is such, *notum sit omnib' hominib' presentib' et futuris, quod ego J. Steward, miles, dedi et concessi Tho' fil' meo primogenito et hæredib' suis, cigninot' meam armor' meor', prout in margine laterali pingitur, quæ mihi jure hæreditar' descendeb' post mort' J. Steward mil' patris mei: habend' sibi et hæredib' suis, una cum omnib' cignis et cignicul' cum dicta nota baculi nodati signal', sub condit' quod quilib' feria solis durante vult a gula Augusti usque ad Cornisprivium apud dom' meam de Darford, unum cignicul' bene signal' mihi aut meis deliberet, quod si defecerit, tunc volo, quod hoc præsens chirographum cassetur penitus, et pro nihilo habeatur. In cui' rei testimon' ad instant' Matildæ uxor' meæ, meum sigil' secret' Christi crucifixi presentib' feci apponi. Hiis testib' R. Clerico, J. D. Conyers, Alano Fabro, et al' dat. apud dom' meam mansional' de Darf. in vigilia S. Dunst' ep' an' regni Regis Hen' post conquest' Angliæ sexti 14.* And in the margent was printed a little ragged staff. And in this case it was resolved, that in some of them which are *feræ naturæ*, a man hath *jus proprietatis*, a right of property; and in some of them a man hath *jus privilegii*, a right of privilege. And there are three manner of rights of property, *scil.* property absolute, property qualified, and property possessory: A man hath not absolute property in any thing which is *feræ naturæ*, but in those which are *domitæ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain by two ways, by industry, or *ratione impotentia et loci*; by industry as by taking them, or by making them *mansueta*, i. e. *manui assueta*, or *domesticæ*, i. e. *domui assueta*: but in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, *scil.* so long as they remain tame, for if they do attain to their natural liberty, and have not *animus revertendi*, the property is lost, *ratione impotentia et loci*; as if a man has young shovellers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass, *Quare boscum suum fregit, et tres pullos esporcor' suor', or ardear' suor' pretii tantum, nuper in eod' bosco nidificant', cepit, et asportav'*; and therewith agreeth the Regist. and F. N. B. 86. L. & 89 K. 10 Ed. 4. 14. 18 Ed. 4. 8. 14 H. 8. 1 b. Stauf. 25 b. &c. vide 12 H. 8. 4. & 18 Cro. EL 372. Kelw. 118 a. Owen 20. Goldsb. 129. 1 Roll. 916. Went. 81. Cro. Jac. 46, 47. Comyns 34. 3 Lev. 227.

3 Inst. 98, 109,
110. Cro. El.
125. Cro. Car.
388, 545, 564.
Co. Lit. 47 a.

The three man-
ners of right
of property.
Doct. pl. 514.

2 B. and C. 938.
4 Dow. and
Ryl. 534.

F. N. B. 86. M.
87 a. Cr. Car.
388, 554.
Co. Lit. 87 a.
F. N. B. 47 a.
Co. Lit. 8 a.
Cro. EL 372. Kelw.
118 a. Owen 20. Goldsb. 129. 1 Roll. 916. Went. 81. Cro. Jac. 46, 47. Comyns 34. 3 Lev. 227.

H. 8. 12. But when a man hath savage beasts *ratione privilegi*, as by reason of a park, warren, &c. he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore in an action, *Quare parcum warrennum, &c. fregit et intravit, et 3. damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say (*suos*) (A) for he hath no property in them, but they do belong to him *ratione privit'* for his game and pleasure, so long as they remain in the privileged place; for if the owner of the park dies, his heir shall have them, and not his executors or administrators, because without them the park, which is an *inheritance, is not complete; nor can felony be committed of them, but of those which are made tame, in which a man by his industry hath any property, felony may be committed. And therewith agrees the rule of the book in 3 H. 6. 55 b. 8 E. 4. 5 b. 22 H. 6. 59. which is ill reported, and 43 E. 4. 24. *vide* 22 Ass. 12 H. 3. 13 Eliz. Dyer 306. 38 E. 3. 10. *Vide* 2 E. 2. tit. Distress, 2 E. 2. Avowry 182. But a man may have property in some things which are of so base nature, that no felony can be committed of them; and no man shall lose life or member for them, as of a blood-hound or mastiff, *molessus*, 12 H. 8. 3. *Vide* 18 H. 8. 2 (b). But he who steals the eggs of swans out of the nest shall be imprisoned for a year and a day, and fined at the will of the King; one moiety to the King, the other to the owner of the land where the eggs were so taken, and that is by the stat. of 11 H. 7. cap. 17. And it hath been said of old time, that he who steals a swan in an open and common river, lawfully marked, the same swan (if it may be) or another swan, should be hung in a house

[* 18 a.]
3 Inst. 98, 99,
109, 110.

No felony can
be committed
of a blood-
hound, mastiff,
&c.
3 Inst. 109.
Stam. Cor. 25
b. Salk. 139.

(A) Acc. *Sutton v. Moody*, 1 Com. Rep. 33. *Mallack v. Eastley*, 3 Salk. 291.

(B) "Of those beasts or birds that are *feræ naturæ*, but reclaimed and made tame or domestic, and serve for food, larceny may be committed, as deer, conies, pheasants, partridges: but then it must be, when he that steals them knows them to be tame: and so of reclaimed hawks, and likewise of the young of such larceny may be committed: but of the young of those beasts or birds that are *feræ naturæ*, though in a park, and though the owner hath a kind of property *ratione loci privilegii et impotentie*, yet larceny cannot be committed of them, as of young fawns in a park, young conies in a warren: of young pigeons in a dove cote, fish in a trunk or net, larceny may be committed, 1 H. P. C. 511.
"Of wild swans, nor of their young, larceny cannot be committed: but if they be made tame and domestic, or if they be marked and pinioned, it is felony to take them or their young. But it seems, that if they be marked, and yet flying swans that range abroad out of the precincts and royalty of the owner, it is not felony to kill and take them because they cannot be known

"to belong to any, Dalt. cap. 156. p. 499. "Co. P. C. p. 109. 110. 1 Hale P. C. 511.

"Larceny cannot be committed in some things whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass in respect of the baseness of their nature, as mastiffs, spaniels, greyhounds, bloodhounds, or of some such things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, &c. or their whelps, or calves, because, though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c. made tame, which though wild by nature serve for food." 1 H. P. C. 512. And accordingly in *Rex v. Scaring*, Russ. and Ry. C. C. R. 350, the Judges held, that ferrets, though tame and saleable, could not be the subject of larceny.

Stealing dogs renders the offender liable upon a summary proceeding to fine or imprisonment and whipping, 10 Geo. 3. c. 18. Vid. Burn's Justice, tit. Dogs.

It seems that an action of trover will lie for any reclaimed animal, Cow. Dig. *Action sur Trover* (c). And in trover for a dog it need not be averred that it was tame, *Ireland v. Higgins*, Cro. Eliz. 125.

Wing. Max. 17.

A man may
prescribe in
swans, although
they are royal
fowls.

[* 18 b.]

by the beak, and he who stole it shall in recompence thereof be obliged to give the owner so much wheat that may cover all the swan, by putting and turning the wheat on the head of the swan, until the head of the swan be covered with the wheat. And it was resolved, that in the principal case the prescription was insufficient; for the effect of the prescription is to have all wild swans, which are *feræ naturæ*, and not marked *nidificant'*, *gignent'*, *et frequentant'*, within the said creek. And such prescription for a warren would be insufficient, *scil.* to have all pheasants and partridges, *nidificantes*, *gignentes*, and frequenting within his manor. But he ought to say, to have free warren of them within his manor: for although they are *nidificantes*, *gignentes*, and frequenting within the manor, he cannot have them *jure privilegii*, but so long as they are within the place. But it was resolved, that if the defendants had alleged, that within the said creek there had been time out of mind a game of wild swans not marked, building and breeding; and then had prescribed, that such Abbot and all his predecessors, &c. had used at all times to have and take to their use some of the said game of wild swans and their cignets within the said creek, it had been good; for although swans are royal fowls, yet in such a manner a man may prescribe in them; for that may have a lawful beginning by the King's grant: for in Rot. Parliam. 30 Ed. 3. part 2. num. 20. the King granted to C. W. all wild swans unmarked between Oxford and London for seven years. *In eodem Rot' an' 16 R. 2. p. 1. num' 39.* the like grant of wild swans unmarked in the county of Cambridge to B. Beresford Kt. *In eodem Rot' an' 1 H. 4. p. 6. num' 14.* A grant made to J. Fenn, to survey and keep all wild swans unmarked, *ita quod de proficuo respondeat ad Scaccarium.* *By which it appears that the King may grant wild swans unmarked; and by consequence a man may prescribe in them within a certain place, because it may have a lawful beginning. And a man may prescribe to have royal fish within his manor, as it is held in 39 Ed. 3. 35. for the reason aforesaid. And yet without prescription they do belong to the King by his prerogative.

SIR THOMAS CECIL'S CASE.

Mich. 39 and 40 Eliz

In the Exchequer.

A. seised of a manor agreed with B. to exchange divers parcels thereof with him for lands of B. situate in the same town. Before any exchange perfected, A. conveys the manor and the lands of B. by the special name of B. by deed indented and enrolled to the Queen, her heirs and successors, and covenanted that he was seised in fee-simple of the manor and of the land late B.'s; and A. was bound to the Queen in an obligation to perform the said covenant amongst others. A. before that time had exhibited an English bill in the Exchequer chamber containing the matter aforesaid; and the lands, parcel of the manor intended to be given in exchange to B., were of greater value than the said land of B., so that the Queen was not deceived in the value; which lands parcel of the manor passed to the Queen by the conveyance of the manor, and the covenant and obligation of A. was broken. A., in his bill relied on stat. 33 H. 8. which allows any person of whom any such debt or duty is, &c. to shew in bar or discharge good and sufficient cause and matter in law, reason, or good conscience, &c. Process was sued against A. on the said bond out of the Exchequer; and A. prayed by his said bill to be relieved upon the act, and A. was relieved accordingly.

By the words of the act, the said Courts, &c. shall have full power and authority to accept, &c. and wholly and clearly to acquit and discharge, all and every person, &c.; the Exchequer chamber may well upon the said English bill (although the suit was by process at the common law in the Court of Exchequer before the Barons) make a decree in the case, for to this purpose they are but one Court.

The 33 H. 8. c. 39. s. 79. extends to all the King's debts and process thereupon as well at the common law as upon that act.

Although the obligation was made for performance of covenants; yet, after it was broken, it was a debt due to the King by obligation within the act.

SIR Thomas Cecil being seised of the manor of Strickston in the county of Northampton did enter into communication with one Foster to exchange divers parcels thereof with him for certain lands which the said Foster had in the same town; and before any exchange perfected, Sir Thomas did convey the said manor, and the said land of the said Foster, by the special name of the said Foster by deed indented and enrolled, to Queen Elizabeth, her heirs and successors, and

7 Price 101.

covenanted with the Queen, that he was seised as well of the said manor as of the said land late Foster's, of a good estate in fee-simple, &c. and the said Sir Thomas was bound to the Queen in an obligation of ten thousand marks to perform the said covenant amongst others. And the said Sir Thomas had before that time exhibited an English bill in the Exchequer-chamber, containing the matter aforesaid; and the said lands, parcel of the said manor intended to be given in exchange to Foster, were of greater value than the said land of the said Foster, so that the Queen was not deceived in the value; which lands parcel of the manor passed to the Queen by the conveyance of the manor, and nevertheless the covenant and obligation of the said Sir Thomas as to that was broken and forfeited by the rigour of the law.

[* 19 a.]

(a) Hard. 27,
304, 368, 442.
4 Inst. 118, 119.
3 Co. 12 b.
Post. 21 a. b.
Lane 51. O.
Benl. 65, 66,
67. Lit. Rep.
87, 88.

*But the said Sir Thomas in his bill did rely on the stat. of 33 (a) H. 8. c. 39. by which it is enacted, "That if any person of whom any such debt or duty is, or at any time hereafter shall be demanded, allege, plead, declare, or shew in any of the said courts, good, perfect, and sufficient cause, and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty, or why such person or persons ought not to be charged or chargeable to, or with the same, and the same cause or matter sufficiently prove in such one of the said courts as he or they shall be impleaded, sued, vexed, or troubled for the same, that then the said courts, and every of them, shall have full power and authority to accept, judge, and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so pleaded, vexed, sued, or troubled for the same, any thing in this present act before mentioned to the contrary notwithstanding, &c." And that process was sued against him on the said bond out of the court of Exchequer. Upon which act of Parliament, and the matter aforesaid (being as he supposed good, perfect, and sufficient cause and matter in reason and good conscience within the said act to discharge him of the said bond), the said Sir Thomas by his said bill prayed to be relieved; and thereupon he had a commission to examine witnesses, to prove the matter of his bill to be true, which was returned and published. And upon the hearing of the cause in court in the Exchequer-chamber, it appeared by the testimony of divers witnesses that the plaintiff had made direct proof of all the parts of his bill. And now, in this term, 39 and 40 Eliz. divers questions were moved touching this matter. 1. And the principal was, if the branch of the act extended to any debt mentioned in the said act, for which the King had remedy by the common law, or to such debts and such cases only for which the said act gave a remedy to the King which he had not before. 2. If the court could make a discharge by decree on this English bill within the intention of the act. And as to the first, it is to be known that divers branches of the act are to be considered: 1. The act makes all obligations to the King in nature of a statute staple. 2. Another branch gives the suit to the King, although

4 Inst. 118, 119.

which, upon conference had by Sir Roger Manwood and the other Barons, with the two Chief Justices, by decree he was discharged of the said recognizance, &c. Another case cited was—Thomas Duke of Norfolk was attainted by parliament, anno 38 H. 8. And King E. 6. sold to Sir Edward Rous divers timber-trees growing upon the possessions of the said duke in Suffolk; and Sir Edward was bound in an obligation to King Ed. 6. for payment of certain money, at a certain day, for the said trees, and before the day of payment, and before the said Sir Edward cut down any of the said trees, Edw. 6. died. . And at a parliament held anno 1 Reg. Mar. it was declared by parliament that the said attainder of the said duke was void; for which cause the said Sir Edward could never enjoy the said trees according to his bargain: and in a *scire facias* in the Exchequer on the said obligation against the heir and terre-tenant of Sir Edward anno 28 Eliz. they appeared, and pleaded all the said matter in equity in bar and discharge of the said obligation in a latin plea in the Exchequer. And upon good consideration of the stat. of 33 H. 8. by the barons, and of the said plea, at last (after it had depended long) it was resolved by the barons that the defendants were to be relieved within the said act; and that the defendants might well plead it in bar. And thereupon Popham the Attorney-General, seeing the opinion of the court, *ulterius prosequi non vult*. Both which precedents I shewed to the Justices; and, accordingly, it was resolved by all the Justices of England (who met together to give their opinions in the said case) that Sir Thomas Cecil was to be relieved upon the said matter in equity within the purview of the said branch of 33 H. 8. And, secondly, that the court of Exchequer-chamber might well, upon the said English bill (although the suit was by process at the common law in the court of Exchequer before the barons), make a decree in the case; for to this purpose they are but one court. Then it was moved, if the next proviso next following after the branch concerning the equal charging of land liable to the King's debt in the hands of every owner and possessor, that some of them should not be charged only, but all entirely, if that extends to all the King's debts; and to all executions for the levying of them as well at the common law as on the said act. And it was resolved by them, that the said branch did extend to all executions for the King's debts, as well at the common law as on the said act; and that all should be equally extended by force of that branch according to the purview of that act. It was also resolved, that although the obligation was made for performance of covenants, yet after that it was broken (as it was in the case at bar at the time of sealing and delivery thereof) that it was a debt to the King by obligation within the act.

Ante, 13 a.

[* 20 b.]

Hard. 368, 442.

THE LORD ANDERSON'S CASE.

Trin. 39 Eliz.

In the Exchequer.

ANDERSON
v.
SIBTHORPE.
Pt. VII.—21 a.

Tenant in tail of the manor of D. becomes bound in a recognizance to I. S., which recognizance afterwards comes to the Queen by the attainder of I. S. for high treason; tenant in tail dies, and the issue in tail aliens the land *bona fide*; the Queen cannot by force of stat. 33 H. 8. c. 39. s. 75. extend the manor of D. in the hands of the alienee. And resolved, 1. At common law if tenant in tail became indebted to the King by judgment, recognizance, obligation, or otherwise, and died, the King could not extend the land in the seisin of the issue in tail, for the King is bound by the stat. *De Donis Conditionalibus*. 2. The 33 H. 8. c. 39. extends only to judgments, recognizances, obligations, or other specialties; therefore if tenant in tail be in *any other manner* indebted to the King, and dies, the land in the seisin of the issue in tail shall not be extended by virtue of that act. 3. If tenant in tail becomes indebted in one of the ways within the act, and dies, the land can be extended only in the seisin of the issue in tail, and not in the seisin of the alienee to whom it has been *bona fide* aliened before any process or extent. 4. The 33 H. 8. c. 39. extends only to debts originally and immediately due to the King by judgment, recognizance, obligation, or other specialty, and not to debts which are due to subjects, and did belong or accrue to the King by reason of attainder, gift, outlawry, &c.

BETWEEN the Lord Anderson Chief Justice of the Court of Common Pleas, and Sibthorpe of the Middle Temple, a question was moved upon the branch of the said act of 33 H. 8. cap. 39. That is to say, "That all manors, lands, &c. which now be, or that hereafter shall come, or be in or to the possession or seisin of any person to whom the same manors, lands, &c. have heretofore or hereafter shall descend, &c. in fee-simple, or fee tail, &c. by or after the decease of any of his or their ancestor or ancestors as heir, or by gift of his ancestor, whose heir he is, which said ancestor or ancestors was, is, or shall be indebted to the King, or to any other

"person to his use, by judgment, recognizance, obligation, or other specialty; that then, in every such case, the same manors, lands, &c. shall be and stand by authority of this act from henceforth charged and chargeable, to and for the payment of the same debt." If tenant in tail of the manor of D. be bound in a recognizance to J. S. which recognizance afterwards comes to the Queen, by the attainder of J. S. of high treason, and afterwards tenant in tail dies, and the issue in tail aliens the land *bona fide*, if the Queen may extend the manor of D. in the hands of the alienee. And in this case four points were resolved by the barons on conference had with Popham, Chief Justice, and divers other Justices. 1. It was resolved, that before the said statute of 33 H. 8. if tenant in tail of land became indebted to the King by judgment, recognizance, obligation, or otherwise, and died, the King should not (a) extend the land in the seisin of the issue in tail; for the King is (b) bound by the stat. *De Donis Conditionalibus*, as it is adjudged in Plowden's Commentaries in the Lord Berkley's case 22. in the principal case; and therewith agrees, as to the point in question, the resolution of the Court in the Exchequer, and of the Court of Surveyors in the case of Brown, father of Justice Brown, as * it is reported in Plowden's Commentaries 249 b. So one point well resolved, in which there was variety of opinions in our books. *Vide* 39 Ass. p. 18. 47 E. 3. 8 Regist. 143, 144. F. N. B. 217 a. & b. 2dly. It was resolved, that if tenant in tail becomes indebted to the King by the receipt of the King's money, or otherwise, unless it be by judgment, recognizance, obligation, or other specialty, and dies, the land in the seisin of the issue in tail by force of the said act of 33 H. 8. shall not be extended for such debt of the King's, for the stat. of 33 H. 8. extends only to the said four cases; and all other debts remain at common law. 3. It was resolved, that if tenant in tail becomes indebted to the King by one of the four ways mentioned in the said act, and dies, and before any process or extent the issue in tail *bona fide* aliens the land in tail, that now this land shall not be extended by force of the said act of 33 H. 8.; for as it appears by the words of the said branch, it makes the land in the possession or seisin of the heir in tail only liable against the issue in tail, and not the alienee. For the effect of the purview as to that purpose is, "That all lands which shall be in the possession or seisin of any person, to whom the same shall descend in fee tail as heir, whose ancestor was indebted to the King, &c. that then, in every such case, the same land shall be charged with the King's debt;" so that by the express purview of the act, the land shall be only extended so long as it is in the possession or seisin of the heir in tail; for the act saith "That in every such case the land shall be charged," and forasmuch as the land against the issue in tail was not extendable before the said act, the King hath the benefit to extend it in the possession of the heir in tail, which he could not before, but the

1st. Resolution.

(a) F. N. B.

217 C.

(b) 1 Co. 44.

48 a. 5 Co. 14

b. 11 Co. 72 a.

Post. 32 a. 41 b.

Plowd. 243 b.

244 a. 248 b.

249 b. 251 b.

[*21 b.]

252 a. 1 Roll.

Rep. 153.

2d. Resolution.

O. Benl. 66.

3d. Resolution.

7 Co 28 a. *tem-**pus occurrit**regi.* Co. Lit.

185.

3 Cro. 14 b.

Ante 19 b.

Plowd. 440 a.
3 Co. 12 b.Hard. 217.
[* 22 a.]

4. Resolution.

† 1 And. 129,
130.
‡ Lit. Rep. 87,
88.

King cannot extend in the hands of the alienee, for the stat. doth not extend to it: and the makers of the act had reason to favour the purchaser, farmer, &c. of the heir in tail, more than the heir himself, for they are strangers to the debts of the tenant in tail, and they come to the land *bona fide*, and on good consideration. There is another clause next following the said branch, the effect of which is, "And that our sovereign lord, his heirs and successors, shall not be barred, delayed, &c. to demand and receive their just, &c. debts against any of his subjects as heir, or heirs, &c. if any such person or persons shall say or allege, that they have no lands &c. but only entailed or given to them by any of their ancestors to whom they be heirs:" so that by this clause also the intent of the makers of the act appears, that the heir in tail shall be only charged with the King's debt. But lands in fee-simple were extendible, at the common law, in whose hands soever they came; and therefore as to them the statute was but *declarativum antiqui juris*; but as to estates in tail, it was *introducivum novi juris* against the issue in tail, and that in the case at bar makes the difference of the said cases *although both be joined together in one and the same sentence. And Popham Chief Justice said, that so it hath been resolved in the Exchequer before that time, in the case of Serjeant Nicholls, father of the Serjeant that now is, that the lands in the hands of the purchaser of the issue in tail should not be extended by the said act of 33 H. 8. for the debt that the father of the issue in tail owed to the King (by one of the four ways mentioned in the act) but was discharged by the opinion of the Court of Exchequer. 4. It was resolved, that forasmuch as the said debt in the case at bar was originally due to a subject, that such debt is not within the said act of 33 H. 8. to charge the land in the possession or seisin of the heir in tail: for the said act, as to charge lands entailed against the issue, extends only to debts originally and immediately due to the King by judgment, recognizance, obligation, or other specialty; for the words are, (indebted to the King † or any other to his use by judgment, &c.) which is intended to be an ‡ immediate debt, and not to debts which were due to subjects, and did belong or accrue to the King, by reason of attainder, outlawry, forfeiture, gift of the party, or by any other collateral way or means, for which the statute of 33 H. 8. hath a clause a little before the said branch, for the short and general manner, and form of pleading in such cases (for the recovery of them in the Courts mentioned in the said act) on the King's part, *scil.* "That the party such a year and day did give the same debt to the King, or was attainted, outlawed, or other offence, forfeiture, deed, act, or thing committed or done, by reason whereof the said debts did accrue and ought to remain, come, and be to the King." So that the several manners of penning of these two branches manifest the intention of the makers of the act, to prefer immediate debts

due to the King by judgment, &c. before debts of the subjects, which accrued to the King by assignment, attainder, outlawry, &c. and the reason was, because debts due immediately to the King, by judgment, recognizance, obligation, or other specialty, are in their nature higher, and may be better known, and found upon search, than debts due to subjects. Also when J. N. is indebted to J. S. by judgment, recognizance, obligation, or other specialty, and afterwards J. S. is outlawed, &c. by which the debt comes to the King by the outlawry, &c. in that case it cannot properly be said, that J. N. is indebted to the King by judgment, recognizance, obligation, or other specialty; for by them, he was indebted to J. S. and J. S. by his outlawry (which is the King's title) hath forfeited them to the King. So that by force of the judgment, &c. and outlawry, the debt doth belong to the King, and the words of the act are (indebted to the King, or any other to his use by judgment, &c.) so that the debt either ought to be immediately to the King himself; or if it be to any other than the King, it ought to be originally to the use of the King; *and that it is not when the debt is originally due to a subject to his own use, and afterwards forfeited to the King by a subsequent act. And so it was resolved, that for such debt the Queen should not extend either against the alienee of the heir in tail, or against the heir in tail himself; for such debts are not within the said act of 33 H. 8. as to charge the heir in tail; and so remain at the common law as debts immediately due to the King, which are not due by judgment, recognizance, obligation, or other specialty, as hath been said before.

[*22 b.]

[23 a.]

BUTT'S CASE.

Trin. 42 Eliz.

In the Common Pleas.

FISH
v.
BUTT.
Pt. VII.—23 a.

If a man seised of Black-acre in fee, and also possessed of White-acre for years, by his deed grants a rent out of both to A. to have and perceive to him for the term of his life, with clause of distress in both: A. may distrain in White-acre, for rent arrere; and resolved,

1. If lessee for years of lands grants a rent out of the said lands for the life of the grantee, such grant is good during the term, if the grantee live so long; but the grantee hath but a chattel.

If lessee for years of land grant the land for the life of the grantee, the grantee hath the whole term if he so long lives.

2. Grant out of land in fee, and out of land for a term of years of a rent for the life of the grantee, the rent issues only out of the land in fee.

3. In the principal case, White-acre during the term is subject to the distress, although the rent does not issue thereout.

*If a man grants a rent out of the manor of D., and further grants that, if the rent be behind, the grantee shall distrain for the same rent in the manor of S., it is but a penalty in the manor of S., and not a rent issuing out of it *

If the manor of D., out of which the rent is granted, be recovered by eigne title, all the rent is extinct; but if the manor of S., in which the distress is limited, be evicted, the whole rent remains.

If the grantee purchases parcel of the manor of S., the rent is not extinct.

In the principal case the avowry was adjudged to be insufficient: 1. Because the avowry did not make mention of any land, but of the land in which the grantor had but a lease for years. 2. Because the avowant having pleaded the grant out of the term for years only, concluded *virtute cujus*, he was seised in his demesne as of freehold, for term of his life, which is repugnant.

In a replevin between Fish and Butt, the case in effect was, one seised of Black-acre in fee, and also possessed of White-acre for years, by his deed granted a rent out of both to A., to have and perceive to him for the term of his life, with clause of distress in both: and for rent behind A. doth distrain and avow in White-acre; and if the distress was well taken or not, was the question. And it was agreed by the whole Court, that the distress was well taken. And in this case these points were

resolved:—1. That if lessee for years of a carve of land grants to another a rent out of the said carve for the life of the grantee, that it is a good charge during the term, if the grantee so long live; for the grant shall be taken more strong against the grantor, and shall not be void, when by any construction it may be made good (*vide* Plow. Comment. in Welchden's case), and in such case the grantee hath but a chattel. So if the lessee for years grants the carve of land to another, for the term of his life, he hath the whole term if he live so long, as well as in the case of a devise. 2. It was resolved, that when a rent is granted out of land in fee, and out of a term for years, to have and perceive to the grantee for the term of his life, that this, as an estate of freehold, according to the purport of the deed, cannot issue out of the term for years, but out of the land which the grantor hath in fee simple only, because the freehold of the rent can issue out of that, and not out of the chattel. And one entire rent cannot be a freehold out of Black-acre, and a chattel out of White-acre. And to make two rents when one only is granted by one to another, would be in this case injurious, and the bargain and mutual agreement *of the parties cannot charge such thing with rent, which is not (a) chargeable by the law, as out of an hundred, or advowson, 30 *lib. Assisarum* pl. 5. out of a fair, 14 E. 3. *Scire facias* 122. the Earl of Kent's case; neither can a rent be granted or reserved of any estate of freehold out any other hereditament which is not manurable, either in possession, reversion, or by possibility, but is *hereditamentum incorporeum*; for *pacta privata non derogant juri communi*: and in an assise they cannot be put in view, nor can any distress be taken in them. But in the case at bar, White-acre is *hereditamentum corporeum*, and manurable: but for the smallness and incapacity of the interest that the grantor hath in it, this rent of freehold cannot issue thereout, but shall issue only out of the land in fee simple. And in the case at bar, in an assise brought of this rent, the land in fee shall only be put in view; and if the grantee accept a lease, or grant of White-acre, it will not suspend his rent. 3. It was resolved, that White-acre should during the term be subject to the distress of the grantee for the rent during the years, although the rent doth not issue thereout, as in 41 (46) Ed. 3. 14. when land is charged with a rent in fee, goods (b) and chattels may be bound to the distress (A). And it was said, forasmuch as White-acre is only charged with distress, if the grantee takes a lease of any part thereof, it is no suspension of the distress, but that he may distrain in the residue; for it is not issuing out of the land, but to be taken on the land: as if I have a warren in another's land, and take a lease of parcel of the land, although the land be charged with warren, yet, forasmuch as it doth not

1 Resolution.
Cr. El. 183.
2 Vern. 36.

V. Postea 25 a.

2 Resolution.
Co. Lit. 147 b.
Cr. Jac. 390.
1 Roll. Rep. 330.
Cr. El. 607, 622.

[* 23 b.]

A rent cannot be granted or reserved of any estate of freehold out of any hereditament which is not manurable.

(a) Co. Lit. 47 a.
5 Co. 3 a. 4 a.
17.

Palm. 105.
Co. Lit. 44 b.
142 a.
2 Roll. 446.
Cr. Jac. 111,
112.

Moor 163, 168.
2 Sand. 303, 304.
Raymond 194.
Cr. El. 690.
Br. Rents 11.
Br. Tenure 26.
Br. Assise 309.
3 Resolution.
(b) Co. Lit.
147 a. b.

A warren in another's land is not suspended by taking a lease of parcel of the land.

(A) Vide note (A). *Jewel's case*, vol. 3. p. 5.

(c) 11 Co. 13 b.
Dy. 30. pl. 209.
Dav. 5 b.
Poph. 169.

If a man grants a rent out of the manor of D., and further grants that if the rent be behind, the grantee shall distrain for the same rent in the manor of S.; it is but a penalty in the [*24 n.] manor of S., not a rent issuing out of it.

Grant that you and your heirs shall distrain for a certain rent within the manor of S. is a grant of a rent out of S.
(d) Co. Lit. 147 a.

2 Roll. 426.
(e) Co. Lit. 147 a.

2 Roll. 425.

(a) Co. Lit.

147 a. 146 a.

148. Roll. 424.

Lit. sect. 221.

9 H. 6. 9 a.

Dy. 22. pl. 141.

41. Ass. pl. 3.

Moor 592.

Plow. 139 a.

(b) Lit. sect.

221.

(c) 2 Roll. 425.

Co. Lit. 147.

(d) Co. Lit.

147 a.

(e) Wing. Max.

24.

Co. Lit. 147 a.

2 Sand. 167.

(f) Co. Lit.

147.

o Co. 58 b.

issue out of the land, it is not any suspension. *Vide* (c) 35 H. 6. 56 a. 14 H. 4. 6, &c. for a man may have a warren in his own lands; so he may in many cases distrain in his own possession, as in 31 E. 1. Distress 64. and 7 H. 6. 3. *per curiam*, one tenant in common may distrain the cattle of the other in the land which they have in common: and 26 H. 8. 5. he may prescribe to distrain in his own land, but not to have a rent out of his own land (d). If a man by deed grants a rent of forty shillings to another out of his manor of D., to have and perceive to him and his heirs; and grants further by the same deed, that if the rent be behind, the grantee shall distrain in the manor of S. (be the manor of S. in the same county or in another, and be it granted by one or divers deeds), the rent is only issuing out of the manor of D., and it is but a (c) penalty that he may distrain in the manor of S.; but both the manors are charged, one with the rent, the other with the distress for the rent, one issuing out of the land, the other to be taken on the land. *And if I grant unto you, that you and your heirs shall (a) distrain for a rent of forty shillings within my manor of S., this, by construction in law, shall amount to a grant of a rent out of my manor of S.; for if it should not amount to a grant of a rent, the grant should be of little force or effect, if the grantee should have only a bare distress, and no rent in him; for then he should never have an assise thereof, &c. and that is the reason that it is often ruled and resolved, that it shall amount to a (b) grant of a rent by construction of law, *ut res magis valeat*. 53 Ed. 3. 12. 3 Ass. pl. 7. 14 Ass. pl. 14. 16 E. 3. tit. Grants 64. 18 Ed. 3. 32. 26 Ass. pl. 38. 50 Ass. pl. 12. 46 Ed. 3. 18, 32. 8 H. 4. 19. 9 H. 6. 9 a. 22 H. 6. 11. Lit. 48 b. And in such case the grantee should not have a writ of annuity. But when one grants a rent out of the manor of D., and further grants, that if the rent be behind, the grantee shall distrain for the same rent in the manor of S., it is but a penalty (c) in the manor of S. for three causes: 1. The law (d) need not make construction that it shall amount to a grant of a rent; for here a rent is expressly granted to be issuing out of the manor of D., and the parties have expressly limited out of what land the rent shall issue, and in what land the distress shall be taken; and the law will not make an exposition against the express words and intent of the parties, when it may stand with the rule of law, (c) *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est*. 2. (f) If in that case it should amount to a grant of a rent out of the manor of S., then the grantor would be twice charged; for if the grantee brings a writ of annuity, that will extend only to the manor of D., for on the grant of a distress in the manor of S. no writ of annuity lies, because the manor of S. is only charged, and not the person of the grantor, as to that; and therefore the bringing of the writ of annuity cannot discharge the manor of S. of any rent; and so the law, by construction against the words and intention of the parties, would do an injury to the grant, or to charge him twice. 3. (g) If in such case the manor of

(g) Co. Lit.
147 a.

S., in which the distress is only appointed, should be in another county, then it hath been often adjudged, that the rent should not issue out of it, but the distress should be as a means and remedy to compel the tenant of the land to pay the rent. And it was said, that there was no difference in reason, that the law in construction should make the rent to be issuing out of it, when it lies in the same county, and not when it lies in several counties, for the words in both cases are all one, and it is not any reason to say, that he shall fail of *recovery by assise. *Vide supra* in Bulwer's case, and the books in 1 Ass.

[* 24 b.]

Autca 3 a. b.

pl. 10. 1 Ed. 3. 21. and other books do not say that the rent issues in such case out of both, but that the land in which the distress shall be taken is charged; and that is true, for it is charged with distress: and forasmuch as it was charged with distress, their opinion was, that the tenants of both should be named in the assise. See the books in 9 Ed. 3. 13. 31 Ass. pl. 27. 17 Ed. 4. 6. 10 Ass. 4. 10 Ed. 3. 18. 2 Ed. 2 Ass. 360. 1 Ass. 10. 3 Ass. 7. 32 H. 6. 27. 22 Ass. 66.

Co. Lit. 147 a.

31 Ass. pl. 27. 29 Ed. 3 Ass. 366. And the opinion of Finchden in 41 Ed. 3. 15. was affirmed for good law, that if the manor of D., out of which the rent is granted, be recovered by eigne title, that all the rent is extinct (n). But if the manor of S., in which the distress is limited, be evicted, yet the whole rent remains. So if the grantee (a) purchases parcel of the manor of S., the rent is not extinct, because the rent issues only out of the manor of D. *Vide* 17 Ed. 4. 6. the like case. And it was said, that if a man (b) grants a rent out of three acres, and further grants, that if the rent be behind, that he shall distrain for the rent in one of the acres, the rent is entire, and cannot be a rent-seck† out of two acres, and a rent-charge out of the third acre, and therefore it is a rent-seck for the whole; and yet he shall distrain for it in the third acre. So if a (c) rent be granted to two and their heirs out of one acre of land, and that it shall be lawful for one of them and his heirs to distrain in the same acre for it, it is a rent-seck, for in regard they stand jointly seised of one entire rent, it cannot be as to one a rent-seck, and as to the other a rent-charge, and this distress is as appurtenant to the rent: and therefore if he who hath the rent dies, the survivor shall distrain; and if both grant over the rent to one, he shall distrain for it (c). But if a man grants a rent out of Black-acre to one and his heirs, and grants to him that he may distrain for it in the same acre for the term of his life, it is a rent-charge for his life, and a rent-seck afterwards *diversis temporibus*. Otherwise (f) is it if the distress be limited for certain years in the same land; there it wholly remains a rent-seck, because the fee and freehold are seck in such case. But it was adjudged in the case at bar, that the avowry was insufficient for divers

The rent is extinct, by recovery of manor D. by eigne title; otherwise of recovery of manor S.

A rent granted out of three acres, cannot be seck as to two, and a rent charge as to the third.

(a) Co. Lit.

147 a.

(b) Co. Lit.

147 b.

† Kelw. 104 a.

Co. Lit. 153 a.

Perk. sect. 323.

(c) Co. Lit.

147 b.

(d) Co. Lit.

147 b.

(e) Co. Lit.

147 b.

(f) Co. Lit.

147 b.

Bridg. 109.

Avowry insuffi-

cient. An

avowry ought

to return. Vid.

to contain sufficient matter, upon which the avowant may have judgment to have a return. Vid. n. (3), *Potter v. North*, 1 Saund. 347 b.

(n) But the grantee shall have a writ of annuity, Co. Litt. 148 a.

[* 25 a.]

causes: 1. Because in the avowry he did not make mention of any land, but of the land in which he had but a lease for years, *sc. quod concessit extra terram illam inter alia quendam reddit'*, &c. Whereas in his avowry he ought to have derived the rent out of the land in fee simple only, for out of that in judgment of law the rent for life was issuing: and although the plaintiff in bar to the avowry hath disclosed the whole truth of the matter in special, which in judgment of the law makes for the avowant, and hath made his case *better for him than the avowant hath made it for himself, yet that doth not make the avowry, which wants substance, good; for the avowry, which is in the nature of a count, ought to contain sufficient matter upon which he may have judgment to have a return. But if the avowry, or any count or replication, &c. wants form or omits circumstance of time, place, &c. there the plea of the other party may mend such imperfections (a), but cannot supply the defect of matter of substance. *Vide* 6 Ed. 4. 2 b. 6 H. 7. 10. 18 Ed. 4. 16 b. 18 E. 3. 34. Plow. Com. Barkley's case 230. 38 H. 6. 17, 18, and 19 22 E. 4. 2. 5 H. 7. 13 b. 7 H. 7. 6 b. &c. 2. The avowant pleaded the grant out of the (b) term for years only, and concluded, *virtute cuius* he was seised *in dominico suo ut de libero tenemento pro termino vite sue*, which is repugnant to have a freehold out of a term for years. And so judgment was given against the avowant for insufficient pleading (c).

(a) 18 E. 4. 16 b.
Doct. pl. 69.
Co. Lit. 303 b.
8 Co. 120 b.
133 and infra.
Hettl. 174.
Er. Car. 209.
11 H. 7. 24 b.
Kelw. 13 a.
(b) Doct. pl.
326.
Antea 23 a.

(c) *Vid.* the cases collected Com. Dig. Pleader, C. 85. and *vid.* *Brooke v. Brooke*, 1 Sid. 184. trespass for taking a hook without any averment of property or possession of the plaintiff. Defendant in his justification averred, that he took the hook out of the hands of the plaintiff: verdict for plaintiff: and on motion in arrest of judgment, the Court held, that the defendant by his special plea had made the declaration good. So where the declaration in debt on bond omitted the words "writing obligato-

ry," and there was no averment that defendant sealed the writing; the defendant prayed over of the condition of the said writing obligatory, and pleaded payment. After verdict, the Court, on error brought for this omission, affirmed the judgment, because the plea admitted it to be a bond, *Courtney v. Greenrille*, Cro. Car. 209. *Vid.* n. 1. *Cabell v. Vaughan*, 1 Saund. 291. n. 3. *Cutler v. Southern*, 1 Saund. 117 b. *Post Dr. Bonham's case*, 8 Rep. 120 b. *Turner's case*, 8 Rep. 133 b. Steph. on Pleading, 140, 162.

Cases of *Quare impedit*. [25 b.]

HALL v. BISHOP OF BATH AND WELLS AND THOMAS MAUNTON.

Pasch. 31 Eliz. Rot. 141.

When by the judgment in a *Quare impedit*, the inheritance, estate, or interest of the patronage is to be divested, he who presented (and his clerk received) ought to be named in the writ: but when the inheritance, estate, or interest of the patron shall not be divested by the judgment, then, if another disturber be named in the writ, it is not necessary to name the rightful patron. S. C. [2 Leon. 58. Sav. 107.] Pt. VII.—25 b.

JOHN Hall brought a *Quare impedit* against the Bishop of Bath and Wells, and Thomas Maunton, clerk, defendants, for disturbing him to present to the vicarage of Wollavington appendant to the manor of Wollavington, whereof the Dean of Windsor was seised in his demesne as of fee in right of his deanery, and presented Robert Pitman his clerk, who was instituted and inducted, and conveyed that manor to the Earl of Leicester by lease for years, who assigned all his interest to George Sydenham, knt., who granted it to Christopher Roll; and during his possession the vicarage became void by the death of Robert Pitman; and the said Christopher Roll presented one John Davis his clerk to the said vicarage, who was admitted, &c. And afterwards the said Christopher Roll did grant his interest in the said lease to the plaintiff. And afterwards the vicarage became void by the deprivation of the said John Davis, whereby it did belong to the plaintiff to present, and the defendant did disturb him, to his damages, &c. to which the Bishop pleaded, that he claimed nothing but as Ordinary, and demanded judgment, if without special disturbance, &c. And Thomas Maunton said, that he claimed nothing in the advowson of the vicarage, but that he is vicar of the said church of the presentation of the said George Sydenham, who is yet alive, not named in the writ, and demanded judgment of the writ. The plaintiff to the Bishop's plea prayed judgment, forasmuch as he claimed nothing in the vicarage; and it was granted, but *cesset executio* until, &c. And as to the plea of Thomas Maunton he did demur in law. And the sole ques-

(a) Cr. Jac. 651.
Fitz. Brief 582.
Br. Quare im-
[* 26 a.]
pedit 24.
3 Lev. 16.

(a) Hob. 162.
1 Anders. 238.
46 E. 3. 14 a.
Doct. pl. 230.
1 Leon. 45.
24 E. 3 a. b.
per Wilby.

(b) 13 H. 8. 14 b.
Co. Lit. 285 b.
303 b. 2 Inst.
414.

(c) 47 E. 3. 11.
a. b.

(d) Hob. 319.
Doct. pl. 230.
231. Hob. 161.
1 Leon. 45.
Dyer 1. pl. 8.
1 Jones 161.

(c) Doct. pl. 231,
232.
† F.N. B. 34 K.
2 Inst. 356.
2 Roll. 349.
Co. Lit. 133 b.
344 a. b.
Cr. Jac. 463.
(f) 6 Co. 49 a.
2 Inst. 356.
2 Roll. 349.
Co. Lit. 119 b.
344 a.
Cr. Jac. 463.
Contra Wats.
279.
(g) Noy 151.
2 Roll. Rep.
239.
2 Show. 167. 3 Lev. 16, 206. Hob. 315. Noy 151.

tion of the case is, if the *Quare impedit* lies against the Bishop and the incumbent, without naming the patron. And it was resolved, that the writ (a) should abate, and that the patron ought to be named in the writ, and that for two reasons: 1. Because the patronage would in this case be recovered against *him who hath nothing in the patronage. And it is not reasonable that he who is patron should be dispossessed and ousted of his patronage, when he is a stranger, and not party to the writ; and especially in this case, when he may be made party to the writ. 2. At the common (a) law the incumbent could not plead any plea which concerned the right of patronage, and therefore it would be against reason that he should be only named in the writ, who at the common law cannot defend the patronage, and he who hath the patronage, and can plead to the right of it, omitted in the writ: for at the common law every one shall plead a plea which is fit for him, and pertinent to his case; as in assise against disseisor (b) and tenant, &c. the tenant shall plead a plea which concerns the tenancy, and not the disseisin. And the incumbent at the common law shall not plead to the right of patronage in which he hath nothing, but the patron shall plead to that. And the mischief was, that (c), by the faint pleading or confession of the patron in a *Quare impedit*, the incumbent was without remedy, as the book is adjudged in 18 Ed. 3. 23 b. which was before the statute of 25 Ed. 3. *Vide* 22 Hen. 6. 28 a. 9 Hen. 6. 30 a. b. 31 a. &c. But the stat. of 25 Ed. 3. cap. 7. enables the (d) possessor, &c. (which is as much as to say, the incumbent, after induction, as it is held in 4 Hen. 8. Dyer 1.) to counterplead the title taken for the King, and to have his answer, and to shew and defend his right upon the matter, although he claim nothing in the patronage, and by equity he shall plead against all common persons, as the books are in 9 Hen. 6. 30 a. b. 31 a. &c. 22 Hen. 6. 28 a. 13 Hen. 8. 13. 14 Hen. 8. 29. *Vide* 39 Ed. 3. 30. 27 Ed. 3. 81. 46 Ed. 3. 13, 19. 47 Ed. 3. 11 a. b. 2 Rich. 2. Incumbent 4. 8 Hen. 5. 9. 7 H. 4. 31. 13 Hen. 4. 7. 22 Hen. 6. 26. 16 Ed. 4. 11. 2 Hen. 7. 14. 10 Hen. 4. Statham. And it is to be observed, that always when the incumbent pleads in bar, he first saith, that he is *persona* (e) *impersonata ecclesiæ præd'*, &c. by which it is implied, that he is admitted, instituted, and able to plead in bar, *scil.* against the King, that he is admitted, instituted, and inducted; and against a common (f) person, that he is admitted and instituted, for then *est ecclesia plena et consulta*, against a common person, as it is held in 2 H. 6. 31. 22 H. 6. 27. 21 E. 4. 34 b. 24 E. 3. 30. 25 E. 3. 47. 58 E. 3. 9 a. 44 E. 3. 3, &c. But this difference in the case at bar was taken and agreed; that when the inheritance, estate or interest of the patron in the patronage is to be divested by the judgment in the *Quare impedit* brought by J. S., there J. N. (g) who presented (and his clerk received) ought to be named in the writ; but when the inheritance, estate, or interest of the patron shall not be divested by the

judgment, then if another disturber be named in the writ, it is not needful to name the rightful patron in the writ, and with this difference agree our books. For in (h) 42 E. 3. 7 a. one brought a *Quare impedit* against another; the defendant said, that he claimed nothing in the patronage, but said, that the Bishop did present him by lapse, judgment if, &c. and there Belknap prayed a writ to the Bishop, because he had disclaimed in the patronage; and the Court would not grant it, because inasmuch as neither the patron, nor the Bishop (who in the same case was *in the place of the patron) were not named in the writ, it was adjudged that the writ should abate; and if such writ should be maintainable, every patron by covin between a stranger and the incumbent might be ousted of his advowson, and therewith agree 9 H. 6. 30 a. b. 31 a. &c. 3 H. 4. 2 b. and 3 a. 13 H. 8. 13. But in 7 H. 4. 25, 37. there in a *Qua' imp'* because the presentation was only recovered, and not the advowson, nor the patron put out of possession, the writ was adjudged good without naming of the patron. If a *Quare impedit* be brought against the patron and the incumbent, and the patron dies pending the writ, the death of the patron shall not abate (a) the writ, as it is adjudged in 9 H. 6. 31. For there are two mischiefs, one if the writ should abate, the disturbance would be unpunished; and although the writ was well brought, yet the plaintiff would be without remedy, because there wants a disturber: and of the other part the other mischief is, that if the writ should not abate, but the plaintiff proceed to judgment and execution, the very patron would be out of possession. And forasmuch as in the one case, if the rightful patron should be out of possession he hath remedy by a writ of right to recontinue the advowson; and in the other case, if the writ should abate, the plaintiff would be without remedy, which would be the greater mischief, and for this cause the writ shall stand, and shall not abate; and therewith agree 7 H. 4. 26 b. 13 H. 8. 13. 9 H. 6. 57. And a *Quare imp.* well brought by divers, as coparceners, or joint-tenants, &c. shall not abate by the (b) death (A) of one of them; nor a *Quare impedit* brought by the husband and wife shall not abate by the death of the wife, because otherwise the plaintiff (if the six months be past) would be without remedy, as the books are in F. N. B. 35 b. 38 E. 3. 43, 37. 9 H. 6. 11. 7 H. 4. 19. 14 H. 4. 12. 9 H. 6. 30, 57. 1 H. 5. 13. 17 E. 3. 11. 17 E. 3. 304. But if the King presents, and his clerk is admitted and instituted, &c. there the *Quare impedit* may be brought for necessity against the Bishop or incumbent, for it doth not lie against the King. So of the Pope, if he had usurped, 12 H. 8. 12. 4 H. 7. 15, &c. *Vide* 47 E. 3. (c) 11 a. b. The King brought a *Quare impedit* against W. Dawtree of the

(h) Cr. Jac. 651.
Fitz. Brief 552.
Br. Quare impedit 24.

[* 26 b.]

(a) 2 Leon. 58.
Sav. 103, 109.
Cr. El. 324.
Cr. Car. 592.
2 Siderf. 94.
Goldsb. 46.

(b) Cr. Jac. 19.
Cont. Dyer
279. pl. 8. Dal.
7. F. N. B.
35. l. Cr. Car.
529. 10 Co.
134 b. Moor 9.
Cr. El. 324.
Co. Lit. 198 a.

(c) Sav. 109.
47 E. 3. 10b. 11.
a. b. Fitz. Qu.
Br. Mortmain 6.

(A) By stat. 8 and 9 W. 3. c. 11. s. 7. if there be two or more plaintiffs or defendants, and one or more of them die, if the

cause of action survive, the suit shall not abate.

church of Retfield, and made his title, forasmuch as Hamond Bishop of Rochester had presented to the said church by usurpation being void (the advowson of which of right did appertain to three daughters and heirs), his clerk, who was admitted, instituted, and inducted, and afterwards the incumbent resigned, and the successor presented another, who was admitted, instituted and inducted, and he died, by which it belonged to the King to present, forasmuch as the Bishop had gained that advowson to him and his successors without licence, by which the advowson was become in mortmain. The defendant pleaded, that he is Parson of the presentment of W. Wyclesey, predecessor of the Bishop that now is, Thomas by name, so that the patronage is in Thomas; who we conceive ought to be named in the writ, by which we conceive that our lord the King to this writ in which the patron is not named, ought not to be answered, for

[* 27 a.] * we conceive that a *Quare impedit* doth not lie against the incumbent alone, without naming the patron, where it is expressly shewed that there is a patron, who may plead in bar of the plaintiff or other thing to oust the King of the action, which lieth not in the knowledge of the incumbent to plead. And it was adjudged, that the King's writ was good against the incumbent alone, because he might give by the statute what answer he would alone in maintenance of his possession of his church; and the now Bishop who is successor, is no disturber; for the defendant came in by the predecessor, and therefore shall not be charged with damages or costs. And afterwards the plaintiff John Hall perceiving, in the principal case, the resolution of the Court, discontinued his suit, and lost his presentation, *illa vice*.

25 Ed. 3. ch. 7.

[27 b.]

SIR HUGH PORTMAN'S CASE.

Pasch. 40 Eliz.

SIR HUGH
PORTMAN
v.
ARCHBISHOP
of
CANTERBURY.

In *Quare impedit* nonsuit after appearance is peremptory, and a bar, although another *quare impedit* be brought within six months.
So if the plaintiff in *Quare impedit* discontinue his suit.
Otherwise if within the six months the writ abate for false Latin.
Or if the writ abate for misnomer of the plaintiff or defendant, if the plaintiff confesses it.
But if the plaintiff be made a knight, the writ shall abate, and it is peremptory. Vid. the entry, Co. Ent. 481. pl. 4.

IN a (a) *Quare impedit* by Sir Hugh Portman against the Archbishop of Canterbury, and Mountgomery clerk, *ad ecclesiam de Chedsey*, in the county of Somerset, and made his title by reason of a grant of the next avoidance *unica vice*, divers points were resolved: 1. If the plaintiff in a *Quare impedit* be nonsuit (b) after appearance, it is peremptory and a good bar in another *Quare impedit*, although it be brought within the six months: and the reason thereof is, because the defendant upon title made (by which he is become actor) shall have a writ to the bishop to admit, &c. his clerk into the same church, &c., which is a good bar in another *Quare impedit*; and therewith agree 19 E. 4. 9 a. 22 H. 6. 44 b. 45 a. 33 H. 6. 1. 55. 20 E. 4. 14. 21 E. 4. 2 b., &c. F. N. B. 38 k. The same law if the plaintiff in the *Quare impedit* discontinues (c) his suit, the defendant upon title made shall have a writ to the bishop, and by consequence it is peremptory, and therewith agreeth 31 H. 6. 15 a. But if the writ of *Quare impedit* within the six months abates for false (d) Latin (A) or insufficiency of form, that is the fault of the clerk, and shall not be peremptory to the plaintiff, nor shall the defendant thereupon have a writ to the bishop, but the plaintiff may have a new writ of *Quare impedit*; and therewith agree 3 H. 6. 3 a. 31 H. 6. 15 a. F. N. B. 38 H. Vide 34 Ass. pl. 9. the like. So if the writ abate for misnomer (e) of the plaintiff or defendant, if the plaintiff confesseth it, the defendant shall not have a writ to the bishop, for it may be the fault of the clerk in the writing of it. And therewith agreeth F. N. B. 38 M. Vide 31 H. 6. 15 a. But if the plaintiff be made a knight (f) hanging the writ, the writ shall abate, and the defendant shall have a writ to the bishop, and by consequence that is peremptory; for (as we see by common experience in these times) the same is the plaintiff's act, and none is forced or compelled to it.

(a) Acc. 2 Salk. 559. Com. Dig. Pleader 3. l. 12.

(b) Br. *Quare impedit*. 136. Br. Perempt. 74. Br. Brief *ad Evesque* 21. Br. Nonsuit 62. 2 Roll. 388. Hob. 138. Co. Lit. 139 a. Dall. 81, 82. 5 Ed. 3. 35, 36.

(c) Hob. 138. Br. Brief *ad Evesque* 26.

(d) 2 Roll. 387, 388.

(e) F. N. B. 38 m.

(f) 1 E. 6. c. 7. Stile 187. L. 5 E. 4. 19 b. 35 H. 8. Dy. 55 b.

(a) By stat. 4 Geo. 2. c. 26. all writs process, &c. and all pleadings, &c. shall be in the English language.

[28 a.]

BASKERVILE'S CASE.

Trin. 27 El. Rot. 320.

BASKERVILE
and Others
v.
Bishop of
HEREFORD
and Others.
Pt. VII.—28 a.

Title to present by lapse devolved on the Queen. The patron presented one A., who was admitted, instituted, and inducted, and died; held the Queen has lost her title to present by lapse.

The stat. *Prærogativa Regis quod nullum tempus occurrit Regi* is to be intended when the King hath an estate or interest certain and permanent, and not when his interest is specially limited when and how he shall take it. Semble S. C. but not S. P. [1 Leon. 180. 2 Leon. 50.] Vid. the entry Co. Ent. 489. pl. 7.

(b) Palm. 345,
357. 1 Roll.
Rep. 459. 2
Roll. Rep. 422.
2 Roll. 368.
Noy 25.
Winch. 96.
Hob. 152, 166.
Cro. El. 119,
120, 790. Cro.
Jac. 44, 54,
216, 291. Cro.
Car. 356.
Owen 5, 89,
90. Goldsb. 86,
78, 83. pl. 4
Mo. 260, 900.
Dig. 277. pl. 55.
Stanf. Præ.
33 a. b. Dr. &
Stud. lib. 2. c.
36. Lit. Rep.
99, 383. See
stat. 7 Annæ
c. 18.
(d) 1 And. 149.
Plowd. 243 a. See Stanf. Prærog. 32, 33. (c) 6 Co. 49 b. Hob. 347. Lit. Rep. 99, 340. Co. Lit. 41 b. 90 b. 118 a. 294 b. Hard. 24, 25. 1 Jones 79. 2 Inst. 273, 360. Godb. 297, 305, 312, 317. Plowd. 243 a. 221 a. 1 Roll. Rep. 165. 2 Ro. Rep. 422. 1 Anders. 149. Pal. 354, 357. Cr. El. 44. (f) Godb. 305. (g) Moor 224, 269, 270. Cro. El. 44. Cro. Jac. 216. Owen 2. 1 And. 148, 149. Goldsb. 44.

In a *Quare impedit* in the Common Pleas, the case was, that 1 Mar. title to present by lapse was devolved to the Queen to the church of Cusep in the county of Hereford. Sir Nicholas Arnold the patron presented one Evans, who was thereto admitted, instituted, and inducted, and died; and if the Queen had lost her title to present by lapse, or not, was the question; and it was adjudged that the Queen had (b) lost it. For the Queen had but *unam et unicam præsentationem hac vice*; which cannot be extended to the second avoidance; for negligence to present shall lose the subject one presentment only by lapse and not divers; and if the Queen has (c) *primam et proximam præsentationem* granted to her, she cannot take the second. And otherwise great inconvenience would ensue to the patron; for the Queen might forbear to present, and suffer divers to present by usurpation one after the other, and take her turn when she would, and the patron might be in a manner thereby disinherited. And the stat. of (d) *Prærogativa Regis, quod (e) nullum tempus occurrit Regi*, is to be intended when the King hath an estate or (f) interest certain and permanent, and not when his interest is specially limited, when and how he shall take it, and not otherwise; for there time is the substance of his title, and in such case *tempus occurrit Regi*. And so was it at another time adjudged, *Pasch. 28 El. Rot. 412*. in the Common Pleas, between Beverley (g) plaintiff, and the

Archbishop of Canterbury and Gabriel Cornwal, defendants
for the church of Somerby in the county of Lincoln (A).

(A) "But the rule of *nullum tempus occurrit Regi* is subject to various exceptions both at common law, and by statute.—1. "There are many cases in which the subject may make title against the King by prescription, as to treasure trove, waifs, estrays, and such other things as may be seised without matter of record. Ante, fol. 114 a. and b.—2. In some cases the King's right necessarily fails for want of exertion in due time, either because the subject of his right determines before he claims it, or because it is specially limited in point of time by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seizure by the King; for it is then too late to seize for the King: who as Staundford expresses it, hath surceased his time, the estate forfeited being determined, and the right of entry being in him in reversion. Staundf. Prærog. 32 b. The law is the same where the King is entitled to the next presentation; in which case if another presents, and the incumbent dies, the King cannot have the second or any subsequent presentation. This was the opinion of Brown, Justice against Weston in *Willion and Berkely*, Plowd. 243, 249. and was so adjudged in *Baskerville's case*, 7 Co. 28 a. Lord Chancellor Egerton finds fault with the doctrine of this last case; but his objections do not appear in the least satisfactory. See his Observations, on Lord Coke's Reports, 8. 3. Sometimes lapse of time drives the King to a suit. Thus by the statute of the 13th of Richard the Second, and according to Lord Coke by the common law, if the King presents to a benefice already full with an incum-

bent, the King's presentee shall not be received by the ordinary, till the King has recovered his presentment by due process of law, 13 R. 2. stat. 1. c. 1. Staundf. Prærog. 32 b. 2 Inst. 358. Post. 344 b. See also Cro. Jam. 385. 4 H. 4. c. 22. Gids. Cod. 1st. ed. 802. 4. There are several statutes which wholly extinguishes the King's title, if not exerted within a limited number of years. By a statute of the 14th of Edward the Third, the King lost his presentment, where he was entitled by having in his hands the temporalities of a bishopric, or the lands of a person within age, unless he presented within three years after the voidance. But this statute was soon repealed. See 14 E. 3. st. 3. c. 2. 25 E. 3. st. 3. c. 2. 2 Gids. Cod. 1st ed. 800. The chief statutes for limiting the King's title to a certain time now in force are the 21st Jam. 1. c. 2. and the 9 Geo. 3. c. 16. By the former the King is disabled from claiming any manors, lands, or hereditaments, except liberties and franchises under a title accrued 60 years before the beginning of the then session of Parliament, unless within that time there has been a possession under such title. But the efflux of time rendering this provision continually more ineffectual, the latter statute introduces one of a permanent kind by limiting the King to sixty years before the commencement of the suit, or proceedings for recovery of the estate claimed. See further a Commentary on the 21st Jam. in 3 Inst. 188. See also something relative to the rule of *nullum tempus occurrit Regi* in "Hob. 152, 154, 347." Mr. Hargrave's note (1). Co. Lit. 119 a.

[28 b.]

MAUND'S CASE.

Hil. 43 Eliz. Rot. 1108.

In the Common Pleas.

MAUND
v.
GREGORY.
Pt. VII.—28 b.

Resolved 1. A rent-charge granted to one and his assigns, *pro consilio impendendo* may be assigned over. 2. And the assignee need not demand the rent at the day to enable him to distrain. 3. A man who has a rent-seck payable yearly at the feast of Easter, and has once seisin of the rent, and the feast passes, and no tender or demand made of the rent, may after the day come to the land and demand it; and although the tenant be not there, if none be ready to pay the rent, he shall have an assise. Otherwise if the tenant were on the land at the last instant of the feast ready to pay the rent; for in such case he ought to demand the rent of the person of the tenant on the land; and if he cannot be found, then he should make the demand on the land at the next feast of Easter.

In a replevin between Maund and Gregory, the defendant shewed, that a rent-charge out of a house and certain lands was granted by deed to one and his assigns, for his life, *pro consilio impendendo*, payable yearly at four feasts; and for default of payment, if it be demanded, that it should be lawful for the grantee and his assigns to distrain, the grantee assigned the rent to the avowant, the tenant attorned, the assignee on the land demanded the rent after the day, and for default of payment did distrain and avow, on which the plaintiff did demur in law. In this case it was resolved, 1. That a rent granted to one and his assigns, *pro consilio impendendo*, may (a) be assigned over by the express words of the grantor, who granted it to him and his assigns; for *modus (b) et conventio vincunt legem* (A) 2. That in this case the assignee need not demand

(a) Co. Lit.
144 a. Dy. 65.
pl. 1.
(b) 12 Co. 71.
Co. Lit. 19 a.
166 a. 180 a.
Godb. 254. 1 Roll. Rep. 262. 2 Roll. Rep. 332. 2 Sand. 167. Winch. 48, 96. Hob. 40. Lit. Rep. 208. Godb. 254.

(A) "Formerly it was doubted whether an annuity was assignable, though assigns were mentioned in the grant; the argument being that it was a mere personal contract, and therefore a chose in action. See the cases in 2 Vin. Abr. 515. and 3 Vin. Abr. 151. But in a case in C. B. 3 Cha. 1. this objection which in strictness of law carried force with it was overruled, *Gerrard v. Bowden*, Hettl. 80. It seems too that naming assigns is not essential to the making an annuity assignable, the princi-

ple of the objection to its being so being the same whether assigns are mentioned or omitted. However Perkins in the special case of an annuity *pro consilio impendendo* requires naming of assigns, Perk. s. 101. Even too he questions the annuity being assignable. But this was settled in *Maund's case*." Mr. Hargrave's note (1). Co. Lit. 144 b. Vid. *Aubin v. Daly*, 4 Barn. & Ald. 59. note (x). *Nevil's case*, post. p. 124.

the rent at the (c) day, as he ought in case of (d) re-entry, (for there the whole interest or estate shall be defeated) or when any sum (e) *nomine pœnæ* shall be forfeited, in both these cases the demand ought to be made precisely at the day a convenient time before sun-set, in the one case in respect of the condition, and in the other in respect of the penalty. But in the case of distress, he who hath the rent may demand it at what time he will, for no loss or penalty will thereon ensue, but only a remedy to come at his rent, which is arrear, and which is due to him; (B) and so was it adjudged in the Common Pleas, Mich. 40 & 41 Eliz. between Stanley and Read, where the case was, that a rent-charge was granted, payable at a certain day, and if it be behind and (f) demanded, that it should be lawful for the grantee to distrain. The avowant shewed, how that he made a demand at the day; the plaintiff traversed that he did not make a demand at the same day (intending to make the day part of the issue) upon which the defendant demurred in law, and it was adjudged against the plaintiff; for if the demand were at any time after the day, and before the distress, it is sufficient. 3. It was resolved, that if a man who hath a (g) rent-seck (c) payable yearly *at the feast of Easter, and hath once seisin of the rent, and the feast of Easter passes, and no tender or demand made of the rent, he may, although it be after the day of payment, come to the land, and there demand the rent; and although the tenant of the land be not there, yet on such demand, if none be ready to pay the rent, it is a denial in law, upon which he who hath the rent shall have an assise, for as much as no penalty will ensue thereon, but only to have remedy to recover his rent and the arrearages, with costs and damages; and therewith agree Litt. fo. 51. and the Book of Entries, fo. 79 b. 29 Ass. p. 52. But in the same case, if the tenant at the last instant of the feast of Easter be ready on the land to pay the rent, and he who hath the rent, nor any for him comes to demand or receive it, there he who hath the rent cannot come in the absence of him who is tenant of the land, and demand it, and so make him a disseisor, and render damages and costs, without any default in him. But in such case, he who hath the rent, because the default was in him, ought to make a demand of it on the land of the person of the tenant; and if he cannot find him on any part of the land out of which the rent is issuing, then in such case he ought to demand the rent at the next feast of Easter, with all the arrearages; and although it be in the absence of the tenant, yet it will amount to a denial in law, and thereupon he who hath the rent shall recover all the arrearages, damages, and costs.

(c) 1 Roll. Rep. 235. 2 Roll. 426 Co. Litt. 144 a. 202 a. Noy 22, 23. Hob. 207. (d) Co. Litt. 144 a. 202 a. (e) Mo. 357, 358. Hob. 82, 133, 208. 1 Roll. 459. Cro. El. 383. Goldsb. 129, 130, 186. Hutt. 42, 114. 1 Brownl. 179. Palm. 206, 490. 1 Mod. Rep. 89. (f) 1 Sand. 253, &c. Cr. El. 548, 721. 1 Leon. 190, 191.

[* 29 a.]
(g) Hetl. 16. Lit. Rep. 34. Hob. 207. Cro. Car. 508. 2 Roll. 427. Co. Litt. 153 b. Cro. Car. 508. 1 Roll. Rep. 60. 2 Roll. 427. Hob. 207.

Co. Lit. sect. 233. 2 Roll. 427. Hob. 207. 2 Roll. 427, 428.

2 Roll. 428.

(*) By 4 Geo. 2. c. 28. s. 2. landlords or lessors having a right by law to re-enter, for non-payment of rent, may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; and shall recover judgment and execution in the same manner as if the rent in arrear had been lawfully de-

manded, and re-entry made. *Vid.* Serjeant William's note (16). *Duppa v. Mayo*, 1 Saund. 287.

(c) By stat. 4 Geo. 2. c. 28. s. 5. the remedy by distress is equally applicable to every species of rent, whether rent-service, rent-charge, rent-seck, or chief rents, or whether reserved by deed or parol.

[29 b.] Discontinuance of Process, &c. by the Death of the Queen.

Trin. 1 Jacobi.

[Reported
Moor 748.
Cro. Jac. 14.]
See Farring-
ton's case, Cro.
Car. 7.

THE resolution of the Justices after the death of Q. Elizabeth, concerning discontinuance of process, &c. There are two manners of re-summons and re-attachments, the one general, the other special. The effect of the general is, that the King doth direct a writ (*exempli gratia*) to the King's Bench in this form; *Mandamus vobis, quod ad sectam nostram omniumque ligeorum populi nostri, qui prosequi voluerint extra et super omnia sive aliqua recorda, placita, brevia, præcepta, processus, billas, loquelas, appella, fines, et alia memoranda quæcunque in curiâ nostrâ coram nobis existen', vel in posterum coram nobis proventur', omnimoda brevia, resummonit', reattachment', et omnium alior' process' pro nobis et dictis ligeis populi nostri in hac parte habend', secund' bonas intentiones et proposita subscript', mutal' mutandis prout casus requirit, secund' discretionem vestras adjudicetis.* Special resummons is in such form; *Rex vic' salut. Resummonneas per bonos summonitores A. B. quod sit coram nobis in crastino, &c. ubicunque tunc fuer' in Angliâ, audit' record' et judic' suum de loquela quæ fuit in cur' dom' H. nuper Regis, &c. ita quod loquela illa tunc sit in eod' statu quo fuit in pristinâ curiâ præd' nuper Regis in octabis, &c. ultim' præterit', de quo die loquela præd' adornat' fuit usque, &c. tunc proxim' sequent', ante quem diem loquela præd' remansit sine die, eo quod præd' nuper Rex diem suum clausit extremum.* And note, on the general resummons the original and the issue (if any be joined) is revived, for it is a full record, and ought to be entire entered: but the process before the issue joined, nor the voucher, nor the garnishment, &c. shall not be revived without a special writ reciting all the special proceeding, 5 H. 7. 40 a. 9 H. 6. 41 a. 13 E. 4. 1 a. b. 1 E. 5. 2 a. *And it appears by the Book of Entries, tit. Reattachm. 499. that if issue be joined, and the jury returned, and day given for trial, before which day the King dies, yet by special resummons all shall be revived, for the jury was returned of record, and the record thereof was made full and perfect; and therewith agrees 1 Ma. (a) 118. Dyer. Vide 21 E. 3. 44. contrary in the case of aid prayer, for there the jury is not revived as it is there held: but a *Venire facias de novo* shall be awarded. And it is to be known, that the (b) defendant shall never have a resummons or reattachment, because he had not nor can have summons or attachment; and therefore

(a) Dyer 118.
pl. 78.

(b) Co. Lit.
130 b.
2 E. 4, 9, 10.
See L. 5. E. 4.
68, 69. See L. 5. E. 4. 16 a. 77 a. 17 E. 3. 59 b. pl. 57.

at the common law, if a verdict had passed for the defendant and before the day in bank the King died, in that case the plea is discontinued, and the defendant might by *Certiorari* remove the record, and although the parties shall never plead any plea, yet the defendant ought to sue forth a *Scire fac'*, and thereupon have judgment: but without a *Scire fac'* he shall not have judgment because the parties have no day in Court, and the *Scire fac'* shall revive the record, and give day to the parties, against the opinion of Litt. 10 E. 4. 13 b. although he saith that it was so adjudged, that the defendant in such case should presently have judgment. But at the common law by the demise of the King the plea was discontinued, and the process which was awarded and not returned before the King's death, was lost: for by the writ of the predecessor nothing can be executed in the time of the new King, unless it be in special cases; for by the demise of the King not only the (a) Justices of the one Bench, and the other, and the Barons of the Exchequer, but the Sheriffs also, and escheators, and all commissions of Oyer and Terminer, gaol delivery, and Justices of Peace are determined by the death of the predecessor who made them (A). And for the remedy thereof was the statute of 1 Ed. 6. (b) c. 7. made, which provides, that by the demise of the King any action, suit, bill, or plaint, "that shall depend between party and party, in any of the King's Courts, and other courts of record, shall not any wise be discontinued, or put without day, but that the process, pleas, demurrers, and continuances shall stand good and effectual, and be prosecuted and sued forth in such manner and form, and in the same estate, condition, and order, as if the same King had lived." So that now, if any judicial writ or process in any court of record were awarded in the time of the predecessor, it may now be executed in the time of the successor. 1 El. Dy. 165. Accord. But yet that act hath not provided remedy for all the mischiefs. For, 1. If the original be not (c) returned

But see stat. 7, 8 W. 3. process is continued.

(a) Moor 176.
2 Keb. 375.
B. N. C. 203.
1 And. 44, 45.
Dyer 165. pl. 2.
1 El. Dyer 165.
1 E. 4.3. 1 E.
5. 1. 4 Ed. 4.
44. 1 H. 7. 2.
(b) 1 And. 44.
45. Cro. Jac. 11.
Cro. Car. 10.
1 Roll Rep 165.
Co. Lit. 325 a.
Yelv. 52.
Hutt. 82.

(c) Dy. 65. pl.
1 And. 44, 45.
Cro. Jac. 11.

Latch. 110. 5 Co. 47 b. 2 Sid. 94. Cr. El. 677.

(a) By stat. 13 W. 3. c. 2. it is enacted that the commissions of the judges of the superior courts are to be made *quandiu se bene gesserint*: but that it may be lawful to remove them on the address of both houses of parliament. By 1 Ann. st. 1. c. 8. the commissions of the Judges were continued for six months after the demise of the Crown. And now by 1 Geo. 3. c. 23. the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown.

By stat. 1 Ann. st. 1. c. 8. no patent or grant of any office or employment, either civil or military, shall cease, determine, or be void, by the King's demise, but every such patent or grant shall continue in force for six months after such demise, unless superseded by the next immediate successor.

By s. 5. commissions of assize, oyer and terminer, general gaol delivery, &c. shall not be determined by the death of the King, but shall continue in force for six months after such death, unless superseded.

By stat. 1 Ann. st. 1. c. 8. s. 4. no writ, plea, or process, or any other proceeding upon any indictment or information for any offence or misdemeanour, or any writ, process, or proceeding for any debt or account that shall be due, or to be made, to her majesty, her heirs or successors, for or concerning any lands, tenements, or other revenues that shall belong to her or them, that shall be depending, &c. shall be discontinued, or put without day, by reason of her, or of any of their deaths, but shall continue and remain in full force.

[* §0 b.]
10 E. 4. 314.

(a) Dy. 165. pl.
2. 1 And. 44.

(b) Co. 72 b.

(c) 6 Co. 11 b.
Co. Lit. 260.

(d) Cro. Car. 10.

(e) Moor 748.
Cro. Jac. 14.
Cro. Car. 10, 11.
Doct. pl. 8.
Hutt. 82.
Cawly 80.

† 7 Co. 12 a.
Calvin's case.
Note, the case
of the abdica-
tion is an ex-
ception to this
rule.

before the King's death, it is lost; for the words are depending in any Court: but in an appeal of death, if the writ be delivered to the Sheriff within the year, and before the return thereof; or that the Sheriff hath done any thing, the King dies, and the year expires before the day of the return, in that case the common law gives remedy to the plaintiff, *scil.* a *Certiorari* to the Sheriff, returnable in the King's Bench; and thereupon *the plaintiff shall have a re-attachment, although it comes not in by the return of the Sheriff, but by *Certiorari*; and the reason is, for the necessity of the matter, for otherwise the plaintiff who lawfully brought this writ within the year, without any fault in him, would lose his appeal, the year being now past. And therefore forasmuch as by the act of law the writ is discontinued, the law will give a means to revive it, to the end the party shall not be without remedy. So if a man brings a *Formedon* against a pernor of the profits within the year after the title accrued, if before the return of the writ, &c. the King dies, the writ shall be removed into the Common Pleas by *Certior'*, and thereupon he shall have resummons for the mischief, as it is held in 10 E. 4. 13 b. and 14 a. 2. By the demise of the King all offices of (a) Sheriffs are determined; and therefore till new patents of their offices nothing can be done. But in (b) London and other places, where there are Sheriffs of inheritance by charter, there they may execute any process, or judicial writ awarded in the time of the predecessor. 3. In the county court, and the like courts which are not courts of (c) record, it remains as it was at the common law: for the words of the act are, "in any of the King's courts, or other "courts of record." Also the statute extends only to actions, suits, &c. between party and party; and therefore it shall not extend to cases where the (d) King is party; and therewith agrees Stamf. 98 b. And therefore it is necessary to know what the common law is in such cases. If (e) an information of intrusion, or other information be preferred, either merely for the King or *tam pro dom' Rege quam pro seipso*, and the defendant pleads to issue, or a demurrer be joined, and afterwards the King dies, all is abated and lost, but only the information, and that shall stand: for the entry in the Exchequer is (shewing the continuance and death of the King H. 8.) *per quod loquela remansit sine die, et dom' Edw. ipsum nuper Regem in regimine hujus regni successit, ac regimen ejusdem regni super se assumpsit, super quo concordat' quod præd' defend' attachietur de novo ad respond' dicto dom' Regi nunc*, and thereupon an attachment is awarded, on the return of which the defendant shall appear and plead *de novo*; for although it is true, that the King in *genere* doth not die (for there is no † *interregnum*) yet in *hoc individuo*, Henry the King, and Edward the King, &c. dies. And that appears by record, Hil. anno 6 Ed. 6. Rot. 50. an information of intrusion was preferred against J. Schrymsal, Esq. for intruding into the manor of Offeley, in the county of Stafford. The like record Mich. anno 6 Ed. 6. Rot. 15. an information preferred by the King's Attorney, for the King only, against Michael Harecourt on the statute

of Maintenance, Hil. 5 Ed. 6. Rot. 23. In the Exchequer in an information on the statute 32 H. 8. for buying of titles, *tam pro domino Rege quam pro seipso*, and after issue joined the King died, the defendant appeared on *the attachment, and pleaded *de novo*. *Simile per idem record'* Rot. 24. *Simile per idem record'* Rot. 54. *Simile Mic. 1 et 2 Ph. et Mar.* in the Excheq. Rot. 131. in an information of intrusion against Rich. Alford, who appeared and pleaded a special plea; on which there was a demurrer in law, and the demurrer entered: and afterwards Queen Mary died, and upon that a *subpœna* issued to appear *de novo*, returnable Hil. 1 El. which is *in ligula brevium ibidem*; and thereupon the defendant pleaded another special plea, on which issue was taken. And note, to such effect as the precedents are in the Exchequer, so they are also in the King's Bench as to all manner of informations. The like *Pasch. 5 Ed. 6. Rot. 38.* where in a popular action the King died after demurrer on the evidence, and before judgment, and the defendant pleaded *de novo*. Upon which records the law appears to be, that in all the said cases the King being merely party, or when the information is *tam pro dom' Rege quam pro seipso*, when the King dies before judgment all the proceeding on the information is utterly abated and lost, *quia Rex Henric'*, &c. *suit pars qui mortuus est*. But the information or indictment which is recorded for the King shall stand, and the said defendant shall be driven to answer it *de novo*, and nothing shall stand but the information; for that is a record, and cannot abate. And the law hath great reason in it; for on many penal statutes the suit is to be commenced within a certain time; and, therefore, if the information or indictment should not continue in force after the King's death, by the King's death, which is the act of God, the offence would be unpunished. But if the King brings an original writ, as *Quare impedit*, &c. there by the King's death the writ shall abate, because the King, for whom judgment should be given, is dead; and after the death of the King, who is party, no process can be awarded on the original, as it may be on an information or indictment. *Vide Mic. 3 & 4 El. 206. vide 4 Ed. 4. 43. and 44 Br. Offices 25.* If one be indicted in the time of one King, and pleads to issue, and afterwards the King dies, he shall plead *de novo*, as you may see in the case of Edward Smith, who pleaded to issue on an indictment of felony in Middlesex in 3 & 4 Phil. and Mar. in the King's Bench, and after the death of Queen Mary repleaded in 3 & 4 El. and was acquitted. So Clement Palmer, being arraigned in the King's Bench on a nonsuit in an appeal, at the suit of the Queen, Trin. 4 & 5 Phil. and Mary, and pleaded to issue, Queen Mary died, and Mich. 1 & 2. Eliz. he repleaded. *Vide Pasch. 1 Ed. 5.* Traverse of an office in Chancery, and the record sent into the King's Bench, and afterwards the King died. And by the said stat. of 1 Ed. 6. it is enacted, "that in all cases where any person or persons heretofore have been, or hereafter shall be found guilty of any manner of treason, murder, manslaughter, rape, or

[* 31 a.]

Cro. Jac. 14.
Cro. Car. 10, 11.Cro. Jac. 14.
Doct. pl. 3.

Dy. 206. pl. 8.

Cro. Jac. 14.

[* 31 b.]

“other felony whatsoever, for the which judgment of death shall or may ensue, and shall be repried to prison without judgment, &c. that the Justices of gaol delivery shall have full power and authority to give judgment of death against such person so found guilty, and repried, &c.” Before that act, at the common law, if a man had been indicted and convicted by verdict or confession before any commissioners, and before judgment the King died, in that case no judgment could have been given; for the King, for whom the judgment should be given, was dead; and the authority of the Judges who should give judgment was determined: and this act doth remedy those special cases. But all the King’s suits by original bill, information, or indictment, for any other offence, do remain as at the common law.

[32 a.] The Case of a Fine levied by the King Tenant in Tail, &c.

Mich. 2 Jacobi.

Part VII.—32 a. The King being tenant in tail by a gift made to some of his ancestors being subjects, may by fine levied on a grant and render bar the estate tail: but after the render made it seems necessary to have letters patent to grant to the conusee by express words, that he may enter into the land.

Where the King claims in respect of his natural capacity as heir of the body of a subject *per formam doni*, he shall be bound by an act of parliament.

But where he claims in his royal and politic capacity, a general act shall not bind him, unless he be expressly named, except in special cases.

THE King was informed, that divers manors and lands were entailed to Gilbert de Clare, Earl of Gloucester, and the King who now is, is heir of the body of the said Gilbert inheritable to the said land; some of which manors the King and others his progenitors, for good consideration, had granted to divers subjects; all which grants (as was pretended) were in respect of the said ancient estate-tail utterly void. The King that now is, of grace and good will to his subjects, and for their quiet and repose, required Popham Chief Justice, and Coke Attorney-General, to consider how by law he might establish

the estate of the said patentees, and others claiming under them, against the said estate-tail. Whereupon they severally, in the vacation time, did consider on that point; and afterwards, on conference they agreed unanimously, that the King being tenant in tail, by a gift made to some of his ancestors being subjects (as the question is moved) might by fine levied on a grant and render bar the estate-tail, and that for divers reasons. 1. Forasmuch as the King is bound (a) by the stat.

De Donis conditionalibus, as it is adjudged in Lord Barkley's case, Plow. Com. 240. By which act the King is restrained from alienation; for it is enacted by the said act, *quod finis ipso jure sit nullus*; reason requires that the King shall take benefit of the acts of 4 (b) H. 7. and 32 (c) H. 8. which enabls tenant in tail to bar his issues: for it is agreed in all our books that the King shall take benefit of any act, although he be not named, 12 (d) H. 7. 21 a. 35 (c) H. 6. 60. the Lord Barkley's case, Plow. Com. 240. And it would be hard that the King, being issue in tail of a gift made to a subject, should be in worse condition than if he had not been King. 2. There is a great difference when the King claims in respect of his natural capacity, as heir of the body, *per formam doni*, as heir of the body of a subject; for there he shall be bound by an act of parliament (and that was the principal reason of the judgment in the Lord Barkley's case, where the gift *was to King Henry 7. and to the heirs of his body), and when the King claims a thing in respect of his royal and politic capacity, there a general act shall not bind him, unless he be expressly named, unless it be in special cases (f) 3. In the case at bar, the bar which the statute *De Donis conditionalibus* doth work, is against the issues in tail; for the tenant in tail himself, without any help of the act, might bar himself (and so might the King also by special grant). Then the issues in tail at the time of the fine levied by the King are but subjects, who are bound by the said acts, and the estate-tail barred by the fine and proclamations. And note, that the act of 32 H. 8. doth recite that (for avoiding all strifes and controversies) which general word '*all*' includes also the case of the King. And it was observed that the statute *De Donis*, &c. which binds the King, saith, *quod dominus Rex (g) perpendens quod necessarium est in casibus prædictis ponere remedium, statuit, quod voluntas donatoris, &c.* And the stat. of || 4 H. 7. which gives power to dock the estate tail, saith, "The King considereth "that fines ought to be of greatest strength to avoid strifes and "debates, and to be a final end and conclusion: it is enacted, "that after the fine engrossed and proclaimed, &c. the same "fine, &c. shall conclude privies, &c." Within which words the King's issues are included. Also the stat. of 32 (h) H. 8. enacts, "That all fines levied of any lands entailed to the "person so levying the same fine, or to any of his ancestors, "&c." And Gilbert de Clare was in propriety of specch the King's ancestor, and so within the express letter of the act. But it seemed to them, that after the render made, it was necessary to have letters patent to grant to the conusee by express

- (a) Ant. 12 a.
- 1 Co. 44 b.
- 48 a. 5 Co. 14 b.
- 11 Co. 72 a. 1.
- Roll. Rep. 153.
- Plowd. 243 b.
- 344 a. b. 248 b.
- 251 b. 252 a.
- (b) 4 H. 7. cap. 24.
- (c) 32 H. 8. cap. 36.
- || 11 Co. 68 b.
- 1 Roll. Rep. 151.
- Leo. 150.
- (d) 11 Co. 68 b.
- Leon. 150.
- 1 Roll. Rep. 171.
- (e) 1 Roll. Rep. 157.

[* 32 b.]

- (f) 1 Black. Com. 261.
- Vin. Ab. Stat. E. 10. Bac. Ab. Prer. E. 4.
- 3 T. R. 522.

- (g) Plow. 248 b.
- || 4 H. 7. c. 24.

- (h) 10 Co. 50 a.
- 32 H. 8. c. 36.

words, that he may enter into the land; for otherwise the fine being executory on a grant and render, it may be doubted if the conusee, without any such grant can enter on the King. And afterwards, *Mich. 5 Jacobi*, after the death of Popham, this opinion, on consideration and conference had with Fleming and Coke, Chief Justices, and Tanfield, Chief Baron, was affirmed for good law for the reasons and causes before given. And divers fines have been levied by the King according to that resolution.

Vid. note (R. 2.) Alton Woods, Vol. I. p. 101.

[33 a.]

NEVIL'S CASE.*

Mich. 2 Jacobi.

Part VII.—33 a. Ralph Nevil was, by letters patent under the great seal, created Earl of Westmoreland, to him and the heirs male of his body. Held by all the Judges that this was an estate tail within the statute *De Donis*, for it concerns land.

After the death of the said Ralph, Charles Nevil Earl of Westmoreland, lineal heir male of the body of the said Ralph, was attainted of high treason by outlawry and by act of parliament—held that the dignity was forfeited by force of a condition in law *tacite* annexed to the estate of the dignity. Also it was further resolved, that if it had not been forfeited by the common law, that by stat. 26 Hen. 8. c. 13. the said Charles had forfeited the dignity.

In this term this case, by the command of the King, was pronounced to all the Judges. *Anno 21 R. 2.* Ralph Nevil, Lord of Raby, was by letters patent under the great seal created Earl of Westmorland, to him, and the heirs males of his body; which Ralph, by Margaret Stafford his first wife, had issue Ralph Earl of Westmorland, to whom Charles late Earl of Westmorland was lineal heir male of the body of the said

(*) [See Show. Cases in Parliament. 1. That a dignity is not subject to a condition at common law, nor entailable by the stat. *De Donis*, nor barrable by the stat. of Fines, notwithstanding what is said in Nevil's case, see *ibid.* 3. That few cases in

that case are cited aright, &c. See also 1 Jon. 123, 207, *ad idem*, and 4 Inst. cap. of Ireland. That honours cannot be extinguished but by act of Parliament. Q. Skinner 518.]—Note to former edition.

Ralph the first donee; and the said Ralph the first donee, by Joan, daughter of John of Gaunt, Duke of Lancaster, had issue George Lord Latimer (for all his elder brothers were dead without issue male), from whom is lineally descended Edward Nevil, who now is the nearest issue male to the said donee; and afterwards Charles Earl of Westmorland was attainted by outlawry and by parliament of high treason, and died without issue male; and now the said Edward Nevil claimed to be Earl of Westmorland. And in this case three questions were moved to all the Judges of England. 1. If the said limitation of the said dignity to the said Ralph and the heirs males of his body be within the statute *De Donis conditionalibus*, or a fee-simple conditional at the common law. 2. Admitting that it was an estate-tail within the said statute, if by the attainder of treason the estate-tail was forfeited by a condition in law *tacite* annexed to the state of the dignity. 3. If the estate of the dignity was forfeited by the act of 26 H. 8. cap. 13. Or that the said Edward Nevil as heir male of the body of the first donee ought to be Earl of Westmorland. And these points were argued and debated at Serjeants' Inn, in Fleet-street, by the King's Attorney, and by the counsel of the said Edward Nevil. And as to the first it was objected, that the said dignity was not within the statute *De Donis*, &c. for divers causes. 1. Because it was a great dignity derived from the King, as the fountain of all *dignity, and therefore it is not within the said act, which speaks only *de tenement' quæ multotiens dantur sub conditione, viz. cum aliquis terr' suam dat alicui viro*, &c. so this dignity cannot be included within this word tenements or land. 2. The statute saith, *in omnibus prædict' casibus post prolem suscitat' hujusm' feoffati habuerunt potestat' alienandi*, &c. But this dignity was adherent to the blood of the donee, and could not be aliened or granted, neither after or before issue: and therefore such cases of dignities were out of the mischief, the words and intent of the makers of the act *De Donis*, &c. And the opinion in Manxell's case in Plow. Com. the grant of a thing which doth not concern lands or tenements, nor (a) exerciseable in lands and tenements, as an (b) annuity which is personal, is not within the statute *De Donis*, &c. And it was said this dignity was personal, and annexed to the blood of the donee, and by consequence could not be entailed within the said act. But it was resolved by all the Judges of England that a name of dignity might be entailed (A) within the said act: for in the case at bar it doth concern land, for he was made by the said letters patent Earl of Westmorland, who by the common law is a great conservator of the peace; and sheriffs are called *vicecom'*, because in ancient times they were as deputies to earls, though now it is changed. And therefore such office of dignity of any place doth concern land; and therefore may be entailed within the said statute, as

Westm. cap. 1.

[* 33 b.]

Cases in Parl. 1.

(a) Co. Lit. 20 a.
 (b) Co. Lit. 19 a.
 20 a. 1 Roll.
 837.

1. A name of
 dignity may be
 entailed within
 the statute *De
 Donis*.
 (c) 1 Roll. 837,
 838. 12 Co. 81.
 Co. Lit. 20 a.

(A) Vid. *Moore v. Lord Plymouth*, 7 Taunt. 614. S. C. 1 B. Moore, 346. Affirmed on error, 3 Barn. et Ald. 66.

Office of steward, &c. of a manor may be entailed.

(a) 1 Roll. 838.

(b) Co. Lit. 20 a.

5 E. 4. 3 a.

(c) Co. Lit.

20 a.

(d) Roll. 838.

Co. Lit. 20 a.

(e) Co. Lit. 20 a.

(f) 9 Co. 124 b.

Co. Lit. 69 a.

F. N. B. 82. c.

(g) 9 Co. 124 b.

2 Roll. 515, 516.

Co. Lit. 69 b.

83 b. 2 Inst. 5.

6, 7. 17 E. 3.

64 a.

[* 34 a.]

Co. Lit. 69 a.

(h) 9 Co. 124 b.

(i) 6 Co. 52 b.

Stile 229.

Hob. 61. Moor

767.

Every creation of nobility is always of some place.

it is said in Plow. Com. in Manxel's case. The office of steward, (a) receiver, or bailiff of such a manor may be entailed within the said statute, because it is exercisable within lands, 5 E. 4. The office of (b) marshal of England was entailed, 1 H. 7. 28 b. An estate-tail may be of a forestership, (c) 18 E. 3. 27. (B) The office of serjeancy or custody of the (d) church of Nichol' was entailed, 32 H. 6. 28. The earldom of Shrewsbury was entailed to J. Talbot, Knt., and the heirs males of his body. And I have seen a parliament writ in *ann.* 27 H. 6. by which Bromstet was summoned to parliament by the name Lord (e) Vesey, with limitation in the writ to him and the heirs males of his body. And it is to be known, that as in ancient time the senators of Rome were elected *a censu* of their revenues, so here in ancient times in conferring of nobility respect was had to their revenues, by which their dignity and nobility might be supported and maintained. And therefore a knight ought to have (f) 20*l.* land *per ann.*; a baron thirteen knights' fees and a quarter; an earl twenty knights' fees (for there was not any duke in England from the time of the conquest until 11 E. 3. and the Duke of Cornwall was the first duke after the conquest in England.) And that appears by the statute of *Magna Charta*, c. 2: for always the fourth part of such revenue which is requisite by the law to the dignity shall be paid to the King for (g) a relief; as the relief of a knight is 5*l.* which is the fourth part of 20*l.* which is a knight's revenue; and the relief of a baron is 100 marks, which is the fourth part of his revenue, *viz.* 400 marks, and includes thirteen *knights' fees and a quarter; and the relief of an earl is 100*l.* which is the fourth part of 400*l.* which is the revenue of an earl. And it appears by the records of the Exchequer, that the relief of a duke shall amount to (h) 200*l.* and by consequence his revenue ought to be 800*l.* *per ann.*; and that is the reason, in our books, that every one of the nobility is presumed in law to have (i) sufficient freehold *ad sustinend' nomen et onus*. *Vide* 3 H. 6. 48. 11 H. 4. 15. 14 H. 6. 2. See the Countess of Rutland's case in the Sixth Part of my Reports. *Vide* Camd. f. 107. *Nec dum hæreditaria fuit hæc dignitas* (sc. *Comitis*) *verum cum Gulielm' Normanus, jam victor, summam rerum in hoc regno administraret, Comites creati sunt feudales, hæreditarii et patrimoniales, ut in antiquis cartis videre est, de tertio denario comitat', i. qui de placitis proven' in eod' comitatu.* And every baron and other of nobility is always created of some place (c); and now to what value the said old rents in the time of H. 3. and E. 1. at

(a) A dignity may not only be entailed at its first creation, but also a dignity, which was originally descendible to heirs general, may be entailed by parliament on the heirs male of the person seised thereof. See the case of the claim to the Earldom of Oxford in 1626, between Robert de Vere, claiming under an entail of the dignity made by an act of parliament in 16 R. 2. as heir male of

Aubrey de Vere, and Lord Willoughby of Eresby, claiming as heir general. Coll. 173. 3 Cruise Dig. 169. 3rd edit.

(c) "There are many titles of dignity without any place, Hal. MSS. In the King and *Knollys*, 1 Ld. Raym. 13. Lord C. J. Holt says that naming a place is not essential to the creation of a dignity, and mentions the earldom of Rivers as an instance,

this day do amount to, every one knows. And so it was clearly resolved, that the dignity in the case in question was within the statute *De Donis conditional'*; and with this resolution agree divers precedents, and the experience and practice always used: for the earldom of Northumberland was entailed by Queen Mary to T. Percy, and the heirs males of his body: and for default of such issue that H. his brother should be earl to him and the heirs males of his body: and in that case by the attainder of T. of treason, H. was after his death Earl of Northumberland by force of his remainder; and his issue enjoy it at this day. So A. Dudley was by Queen El. created Earl of Warwick to him and the heirs males of his body; and, for default of such issue, that R. his brother should be earl to him and the heirs males of his body: and R. was created Earl of L. in tail, with such limitation to his brother A.; and many other precedents are to the same effect. As to the second point it was resolved, that although this dignity be within the statute *De Donis conditional'* yet, by the attainder of (a) treason, if the statute of 26 H. 8. had not been made, this dignity had been forfeited by force of a condition in law *tacite* annexed to the estate of the dignity: for those who are earls have an office of great trust and confidence, and are created to two purposes; (b) 1. *Ad consulend' Regi temp' pacis*. 2. *Ad defendend' Regem et patr' temp' belli*: and therefore antiquity hath given them two ensigns to resemble these two duties: for, 1. Their head is adorned with a cap of honour and coronet, and their body with a robe in resemblance of counsel. 2. They are girt with a sword in resemblance that they should be faithful and loyal to defend their prince and country. And of both these Bracton speaks, lib. 1. c. 8. (c) *Comites, viz. sive a comitat' sive a societat' nomen sumpser', qui etiam dici possunt consules a consulendo; Reges enim tales sibi associant, ad consulendum et regend' populum Dei, ordinantes eos in magno honore et potestate, et nomine, *quando accingunt gladiis, i. ringis gladiis*. By which appear these two ends, counsel and defence. Then when such person, against the duty and end of his dignity, takes not only counsel but arms also against the King to destroy him, and thereof is

2. By the attainder of treason, the dignity had been forfeited, if the st. 26. H. 8. had not been made. (a) 3 Inst. 19. 1 Jones 76. Lane 46. Godb. 325. Sawyer's Argument in *Quo Warranto* 34. (b) 12 Co. 95.

(c) 9 Co. 49 a.

[* 34 b.]

"But it has been held, that if the King grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional, and not an estate tail, as he would have if a place had been mentioned. See 12 Co. 81. where this was adjudged in the case of a baronet. However, though dignities and titles of honour having relation to some place are intailable by the Crown as tenements within the statute *De Donis*, yet neither the donee nor his issue can bar the entail, by fine, recovery, or any other means, as may be done in the case of other entailable things. See Lord Purbeck's case, Show. Parl. Cas. 1. and Collins' Claims of Bar. 293. in which it was adjudged that the surrender of a dignity to the Crown by fine was void.—Note, that in Lord Pur-

beck's case his counsel distinguished between ancient honours, as being feodary and officinary, and having relation to a place, from modern dignities, as being merely titular and personal, notwithstanding the formality of naming a place in the creation; and from thence infer, that the latter are not within the statute *De Donis*." Mr. Hargrave's note (3) Co. Litt. 20 a. Vid. the argument of Lord C. B. Parker, in Lord Ferrer's case, 2 Eden. Cases temp. Northington, p. 383. where he says—"I beg leave to repeat Lord Nottingham's opinion, that all entailed honours are within the protection of the statute *De Donis*; and, consequently, whether they are from a place or not, they are not forfeited by an attainder of felony."

(a) 2 Roll. 155.

3. If the dignity had not been forfeited by the common law, yet it would have been by stat. 26 H. 8.

2 Roll. Rep. 341.
Lane 46. Godb.
303. 4 Inst. 356.

Cro. Jac. 512,
513.

An annuity of inheritance shall be forfeited by force of this act by attainer of treason.

Effect of agnate to one and the heirs male of his body at common law before the stat. *De Donis*.
Co. Lit. 19 a.

attainted by due course of law, by that he hath forfeited his dignity by a condition *tacite* annexed to the estate of the dignity; in the same manner as if tenant in tail of an (a) office of trust misuse it, or use it not, these are forfeitures of such offices for ever by force of a condition in law *tacite* annexed to their estates, as it is held in 11 E. 4. 1. 20 E. 4. 5, 6. 39 H. 6. 32. 22 Ass. 34. 8 H. 4. 18. 2 H. 7. 11. 14 H. 7. 1. Plow. Com. 370. Nevil's case. As to the third point it was resolved by all the Justices, if that it had not been forfeited by the common law, that by the statute of 26 H. 8. c. 13. the said Charles had forfeited the dignity. For the words of the act are, "shall lose and forfeit to the King's highness, his heirs and successors, all such lands, tenements, and hereditaments which any such offender shall have of any estate of inheritance in use or possession, by any right, title, or means:" and this dignity was an hereditament, and therein the said Charles had an estate of inheritance (b). And where the stat. saith (in use or possession) that was to express that all manner of inheritances should be forfeited for treason, and in their judgments all inheritances were either in use or in possession (for that act doth not extend to rights or titles): and it was necessary to add this word Use; for by the common law an use, which was but a trust and confidence, was not forfeited by attainder of treason. And when an use was expressed, then the addition of possession was necessary; for otherwise nothing but uses would be given to the King. And therefore it was resolved that an annuity of inheritance shall be forfeited by force of this act by attainder of treason, for that is an hereditament; and that was the first general act by which an estate-tail was forfeited to the King for treason. At the common law before the statute *De Donis conditionalibus*, if lands had been given to one and the heirs males of his body, in that case as well the donor as the donee had a possibility, the donor of a reverter, if the donee died without issue male, and the donee to have power to alien if he had issue male. For if the donee had issue a son, now to some intent the condition was performed; for *post prolem suscitatem*, he had *potestatem alienandi*; and the reason thereof was, because he having a fee-simple, and having

(b) In the case of a dignity descendible to heirs general, the attainder for treason of any ancestor of a person claiming such dignity, through whom the claimant must derive his title, though the person attainted was never possessed of the dignity, will bar such claim; for the blood of the person attainted being corrupted, no title can come through him. Case of the Barony of Lumley, Coll. 378. 3 Cruise Dig. 182, 3rd edit. But in the case of entailed dignities no corruption of blood takes place: a dignity in tail, therefore, may be claimed by a son surviving a father attainted for treason, who never was possessed of the dignity. Case of John Murray, claiming duchy of Athol, Lords' Journ. Vol. V. p. 466, 469. 3 Cruise Dig. 182. 3rd edit. A

dignity created by writ, and descendible to heirs general, is also forfeited by attainder for felony of the person possessed of it. But an entailed dignity is not forfeited by attainder of felony, except during the life of the person attainted; for the statute 26 Hen. 8. c. 13. by which estates tail are made forfeitable for high treason, does not extend to attainders for felony, 3 Cruise 181. Vid. the argument of Lord C. B. Parker, in Earl Ferrer's case, 2 Eden. Cases temp. Northington, p. 382. ante note (c) p. 121.

Corruption of blood is confined to the crimes of high and petit treason, and murder; and of abetting, procuring, or counselling the same, 54 G. 3 c. 145.

issue, his issue could not avoid the alienation, because he claimed fee-simple, whereof his father might bar him. And although the donee and his issue also after such alienation died without issue, yet the donor, who had but a possibility or condition in law, and no reversion or estate in him, could not recover the land against the alienee; for by the having of issue the condition was performed as to this intent, *scil.* to make an alienation. But in the same case at the common law, if the donee had *issue a son and died, yet the son had not an absolute fee-simple in him, but only the same power which his father had, *sc.* to alien; and if such issue died without issue, and without any alienation made, the land shall revert to the donor, as Brian held, 12 E. 4. 3. and 18 E. 3. 46. by Huse. For a collateral heir who is not of the body of the donee is not within the form of the gift, the limitation being to the heirs males of the body of the donee, which limitation of heirs males of the body doth exclude all collateral heirs to inherit: but the policy of the law was, to give power after issue to alien for two causes; one that the estate of a purchaser should not be avoided by a remote possibility, *sc.* if the donee and his issue also should die without issue. 2. If he having a fee-simple should not have power after issue to alien, it would be in a manner a perpetuity, and a restraint of alienation for ever, which the common law for many causes will not suffer. And in 4 H. 3. *Formedon* 64. it is adjudged, that where lands were given in frank-marriage, and the donees had issue and died, and afterwards the issue died without issue; that his collateral heir should not inherit; for the donor recovered the land in a *Formedon* in the *Reverter*; and in the said case if the donee had issue two sons, and died, and the elder son had issue a daughter, and died without issue male, the younger son should inherit a fee-simple, *per formam doni* at the common law: so if lands were given to one, and to his heirs females of his body, and he had issue a son and a daughter, and died, the daughter should inherit an estate in fee-simple *per formam doni*. And mark well the statute *De Donis, &c.* doth not create an estate-tail, but of such estate as was fee-simple conditional, and descendible in such form at the common law, as now by the statute the land shall descend; and the only mischief was, that the donee after issue had power to alien in disinherison of his issues, and bar of the reversion; but it doth appear by the said act, that although the donee had issue, yet he had not an absolute fee, so that the collateral heir of the issue should inherit; for the words of the act are, *Et præterea cum deficiente exitu de hujusm' feoffatis, tenement' sic datum ad donator' vel ad ejus hæred' reverti debuit per form' in carta de dono hujusm' expressam, licet exitus, si quis fuerit, obiisset, per factum tamen et feoffamentum, &c. exclusi fuerunt hucusque de reversione, &c.*; by which it appears, that if the heir in tail dies without issue, and without any alienation made, that the land shall revert, and by consequence shall not descend to the collateral heir, 30 E. 1. *Formed.* 65. If the donee in tail had aliened before the statute, and afterwards

[*35.]

Co. Lit. 19 a.

8 Co. 35 b.

1 Roll. 841.

12 E. 4. 3 b.
acc. But see
Plow. 250 b.
per Dyer.
Co. Lit. 19 a.
11 Co. 72.
Plow. 235 b.
245 b.

These rules
still hold in
case of a grant
of annuity, &c.
Co. Litt. 19 a.
20 a. 1 Roll. 837.
Plow. 2, 3.

had issue, and then the issue died without issue, the land should revert : for he had not power to alien at the time of the alienation, but such alienation should bar the issue, as it is adjudged in 19 E. 2. *Formed.* 61. because he claimed fee-simple. *N. B.* These rules yet hold place in case of a grant of an annuity to one and the heirs males of his body, and all other inheritances which are not within the statute *De Donis conditionalibus* (g).

(n) " See the case of the *Earl of Stafford* and *Buckley*, 2 Ves. 170. in which Lord Chief Justice Hardwicke held, that an annuity in fee, granted by the crown out of the $4\frac{1}{2}$ per cent. duties, payable for exports and imports at Barbadoes, was merely a personal inheritance, and not entailable within the statute *De Donis*. According to a manuscript note of the same case, Lord Hardwicke, in giving his opinion, said, that an annuity out of the revenue of the Post-office or Excise savours " no more of the realty than money." Mr.

Hargrave's note (4). Co. Litt. 20 a.

By letters patent, 24 Car. 2. the King granted to the use of A., his heirs and assigns for ever, an annuity of 1000*l.* to be paid out of his revenue of $4\frac{1}{2}$ per cent. at Barbadoes and the Leeward Islands. Held that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue and remainder of a testatrix's personal estate, of what nature or kind soever, to her executors, *Aubin v. Daly*, 4 Barn. and Ald. 59.

[36.]

PENAL STATUTES.

Hil. 2 Jacobi.

Part VII.—36. Queen Elizabeth made a grant under the great seal of the penalty and benefit of a penal statute, with power to dispense with the said statute, and to make a warrant to the Lord Chancellor, or Keeper of the great seal, to make as many dispensations, and to whom, he pleased. Upon letters directed to the Judges, they resolved that the said grant was utterly against law.

Dav. 69 b.
Hard. 448.
1 Siderf. 6.
3 Inst. 186, 187.
1 Show. 398.
1 Salk. 134.
3 Mod. 144.
6 Mod. 86.

This term upon letters directed to the Judges to have their resolution concerning the validity of a grant made by Queen Elizabeth, under the great seal, of the penalty and benefit of a penal statute (A), with power to dispense with the said statute, and to make a warrant to the Lord Chancellor, or

(A) The King cannot grant to any person any penalty or forfeiture, &c. due by any statute before judgment thereupon had, 21 Jac. 1. c. 3. And by the bill of rights, 1 W. and M. sess. 2. c. 2. no dispensation by

non obstante of or to any statute, or any part thereof, shall be allowed ; but the same shall be held void and of no effect, unless a dispensation be allowed of in such statute.

keeper of the great seal, to make as many dispensations, and to whom he pleased; and on great consideration and deliberation by all the Judges of England, it was resolved, that the said grant was utterly against law. And in this case these points were resolved, that when a statute is made by Parliament for the good of the commonwealth, the King cannot give the penalty, benefit, and dispensation of such act to any subject; or give power to any subject to dispense with it, and to make a warrant to the great seal for licences in such case to be made: for when a statute is made *pro bono publico*, and the King (as the head of the commonwealth, and the fountain of justice and mercy,) is by the whole realm trusted with it; this confidence and trust is so inseparably joined and annexed to the royal person of the King in so high a point of sovereignty, that he cannot transfer it to the disposition or power of any private person, or to any private use: for it was committed to the King by all his subjects for the good of the commonwealth. And if he may grant the penalty of one act, he may grant the penalty of two, and so *in infinitum*. And such grant of any penal law was never seen in our books, nor before this age was any such grant ever made; but it is true, that the King may (upon some cause moving him in respect of time, place, or person, &c.) make a *non obstante* *to dispense with any particular person, that he shall not incur the penalty of the statute, and therewith agree our books. But the King cannot commit the sword of his justice, or the oil of his mercy, concerning any penal statute to any subject, as is aforesaid. It was also resolved, that the penalty of an act of Parliament cannot be levied by any grant of the King, but only according to the purpose and purview of the act; for the act which gives the penalty ought to be followed only in the prosecution and levying thereof; and great inconveniences would thereon follow, if penal laws should be transferred to subjects. 1. Justice thereby would be scandalized; for when such forfeitures are granted, or promised to be granted before they are recovered, it is the cause of a more violent and undue proceeding. 2. When it is publicly known, that the forfeiture and penalty of the act is granted, it is a great cause that the act itself is not executed; for the Judge and Jurors, and every other, is thereby discouraged. 3. It will thereupon follow, that no penalty will by any act of Parliament be given to the King, but limited to such uses with which the King cannot dispense. And hereupon divers who had sued to have the benefit of certain penal laws, were upon this resolution denied. And the certificate of all the Judges of England concerning such grants of penal laws and statutes was in these words:—“May it please your Lordships, we have (as we are required by your honourable letters of the 21st of October last) conferred and considered amongst ourselves (calling to us his Majesty’s counsel learned) of such matters as were thereby referred unto us, and have thereupon, with one consent, resolved for law and conveniency as followeth: 1st. That the prosecution and execution of any penal statute cannot be

[* 37 a.]
3 Inst. 154.

Cro. Arg. 109.
6 Mod. 86.
Skinner 173.

2 Inst. 48.

2 Inst. 229.

Cr. Arg. 109.

[* 37 b.]

“granted to any, for that the act being made by the policy
 “and wisdom of the Parliament for the general good of the
 “whole realm, and of trust committed to the King as to the
 “head of justice and of the weal public, the same cannot by
 “law be transferred over to any subject; neither can any
 “penal statute be prosecuted or executed by his Majesty’s
 “grant, in other manner or order of proceeding, than by the
 “act itself is provided and prescribed: neither do we find any
 “such grants to any in former ages: and of late years, upon
 “doubt conceived, that penal laws might be sought to be
 “granted over, some Parliaments have forbore to give for-
 “feitures to the crown, and have disposed thereof to the re-
 “lief of the poor, and other charitable uses, which cannot be
 “granted or employed otherwise. We are also of opinion,
 “that it is inconvenient, that the forfeitures upon penal laws,
 “or others of like nature, should be granted to any, before
 “the same be recovered or vested in his Majesty by due and
 “lawful proceeding; for that in our experience *it maketh the
 “more violent and undue proceeding against the subject, to
 “the scandal of justice, and the offence of many. But if by
 “the industry or diligence of any, there accrueth any benefit
 “to his Majesty, after the recovery, such have been rewarded
 “out of the same at the King’s good pleasure, &c. Dated
 “8 November, 1604.” And to this letter all the Judges of
 England set their hands.

[38 a.]

LILLINGSTON'S CASE.

Mich. 5 Jacobi.

In the Common Bench.

DUNCOMB
 v.
 LILLINGSTON.
 Part VII.—38 a.

A. and his wife, and B. and his wife, were seised of the rectory of L. in fee, and Mich. 31 Eliz. levied a fine thereof to C. and D. and the heirs of C., who granted and rendered a rent-charge of 30*l. per annum* out of the said rectory to the said A. for his life to begin after the death of his wife, with a proviso that the rent should not extend to charge the persons of C. and D. but only the rectory; and rendered the said rectory to A. and his wife, during the life of the wife; remainder to B. and his wife in tail, remainder to B. in fee; 2 Octr. 33 Eliz. A. acknowledged a recognizance in nature of a statute staple to E. 20 Aug. 39.; the wife of A. died, B. and his wife entered into the said rectory, and were thereof seised in tail, remainder to B. in fee. A. 15th Ap-

40 Eliz. released to B. and his heirs the said rent. E. 21 Ap. 40 El. sued a *certiorari* to the clerk of the statutes, &c.; and the said recognizance was certified; and E. sued out an extent, by which the said rent was extended and *liberate* delivered to E. E. for arrears of the said rent during six years and a half, brought debt against B. who all that time was tenant of the land, and averred the life of A. And it was resolved,—1. That as against E. the said rent was not extinct by the release of A. 2. That an action of debt does not lie so long as the rent endures. 3. That although there is an express proviso, that the person shall not be charged in a writ of annuity, yet after the annuity or rent determined, the person of the terre-tenant shall be charged in debt for the arrearages. 4. If a man grants a rent-charge for life, and the rent is *arrere*, and the grantor enfeoffs A., and the rent is behind in his time, and afterwards A. enfeoffs B. and the rent is behind in his time, and afterwards the grantee dies, his executors shall have an action of debt against each of them for the rent behind in his time. S. C. 4 Leon. 235, 239.

JOHN Duncomb brought an action of debt against Thomas Lillingston, (which began in the Common Pleas, *Pasch. 4 Jacobi Rot. 704.*) for 195*l.* and declared that one Faustin Dixwell, and Mary his wife, and the said Thomas Lillingston, and Mary his wife, were seised of the rectory of Lillingston in the county of Bedford in fee, and Mich. 31 Eliz. thereof levied a fine to Papworth and Chambers, and the heirs of Papworth, who granted and rendered a rent-charge of 30*l.* out of the said rectory to the said Faustin for his life, to begin after the death of Mary his wife, the rent yearly to be paid at the feasts of St. Michael the Archangel, and the Annunciation; *Proviso semper, quod prædict' concessio prædict' annuallis redditus 30l. non aliquali' se extendat ad onerand' personas dict' Papworth et Chambers, sed tantummodo ad onerand' dict' rectoriam totâ vitâ ipsius Faustini*: and rendered the said rectory to Faustin and Mary during the life of Mary, the remainder to Thomas Lillingston and Mary his wife in tail, the remainder to the right heirs of Lillingston. 2 October 33 Eliz. the said Faustin before Sir Christopher Wray, Chief Justice, acknowledged a recognizance of 500*l.* in the nature of a statute staple, according to the statute of 23 H. 8. to Duncomb now plaintiff: 20 Aug. 39 Eliz. Mary the wife of Faustin died, after whose death Lillingston and Mary his wife entered into the said rectory, and were thereof seised in tail, the remainder in fee to Lillingston. The said Faustin, 15 Aprilis 40 Eliz. by his deed released to the said Lillingston and his heirs the said rent of 30*l. per annum.* The plaintiff 21 April 40 Eliz. sued out of the Chancery a *Certiorari* to the clerk of the statutes, &c. whereupon the said recognizance in the nature of a statute was certified; and sued forth an extent, by which the said rent was extended; and upon *Liberate* delivered to the plaintiff, the plaintiff, for six years and a half ending at the feast of St. Michael the Archangel, *an. 2 Jacobi*, brought an action of debt against Lillingston, who all that time was

*Pasch. 4 Jac.
Rot. 704.*

32 H. 8. cap. 6.

[* 38 b.]

tenant of the land, and averred the life of Faustin. And upon all this case two questions were moved; 1. Whether this rent of 30*l. per annum* being * extinct by the said release, had such essence as to the plaintiff the conusee, that it might be extended and delivered to the plaintiff. 2. Admitting that it might be extended and delivered to the plaintiff, whether the plaintiff, as this case is, could maintain an action of debt. As to the first it was objected, that this recognizance is in the nature of a statute staple, and the statute of 27 E. 3. c. 9. to which the statute of 23 H. 8. c. 6. refers, gives power to the Mayors of the Staple to take recognizance of debts, &c. and that, on certificate of such recognizance into the Chancery, a writ be sent to arrest the bodies of the debtors, without letting them to mainprize, and to seise their lands and tenements, goods and chattels, and that the writ be returned into the Chancery, with the certificate of the value of the said lands and tenements, goods, and chattels, and that thereon execution be made from time to time in the same manner as is contained in the statute merchant: upon which words it was argued, that rent extinct before execution sued was not within the said words, *sc.* to seise the lands and tenements of the said debtors. For at the time of the execution sued the debtor had not the rent, but it was utterly extinct, and gone by the said release. 2. The writ of Extent is to extend *omnia terras et catalla ipsius Faustini, et in manus dict' nuper Regine seisi siri faceret, ut ea præfat' Johanni liberari faciat*; and forasmuch as the rent was extinct before the said writ of Extent, it is not *in esse* or to be extended, or taken into the King's hands, or to be delivered to the plaintiff. 3. It would be against reason, that the freehold of the rent being extinct, the plaintiff should have execution of it, and thereby to have but a chattel; and the opinion of the 3 & 4 Phil. and Mar. (a) Dyer fo. 205. was cited, where the opinion is, that a rent extinct cannot be extended, &c. To which it was answered and resolved, that to some purposes by the common law a rent extinct shall be said *in esse* (b) as to a stranger; and therefore, if the husband seised of a rent in fee, releases the rent to the tenant of the land, and afterwards the husband dies, now the wife shall be (c) endowed of this rent so extinct, and shall have a writ of Dower. The words of which writ are, *Præcipe A. quod juste reddat B. tertiam partem 30 libr' reddit'*; and the writ of Dower, *unde nihil habet* is, *præcipe A. quod juste reddat B., &c. rationabilem dotem suam quæ ei contingit de libero tenemento quod fuit, &c.* and she shall have grand Cape, or a petit Cape, as her case requires, to seise the rent into the King's hands: for *quoad petentem* it is *in esse*, although in truth the rent is extinct; and see in the Lord Abergavenny's case, fo. 78. (d) in the Sixth Part of my Reports, many cases where a thing extinct shall be said *in esse* (e) for the benefit of a stranger. 2. It was observed, that the said act of (f) 23 H. 8. cap. 6. (by force of which the said recognizance in the case at bar was taken) for the execution refers to the statute staple and statute merchant, *scil.* the said act of 27 E. 3. refers to statute merchant,

(a) Dy. 205. p. 7. Post 38 b. By the common law a rent extinct shall be said *in esse* to some purposes as to a stranger. Husband seised of a rent in fee releases o the tenant, the wife shall be endowed of it. (b) 4 Leon. 235, 239. 2 Inst. 32. a. 1 Jones 62. 2 Roll. 471. Hob. 165. (c) 6 Co. 79 a. Co. Lit. 32 a. 1 Co. 87 b. 8 Co. 145 a. b. (d) 6 Co. 79 a. (e) 1 Jones 62. (f) 3 Co. 12 a.

**de an.* 13 (a) E. 1. The words of which statute are, “ (And [* 39 a.]
 “ when the lands of the debtor be delivered to the merchant, (a) 3 Co. 12 a.
 “ he shall have seisin of all the lands that were in the hands
 “ of the debtor, the day of the recognizance made, in whose
 “ hands soever that they come afterwards, by feoffment or
 “ otherwise.)” Then presently by the recognizance acknow-
 “ ledged the rent was bound, and shall be extended by the ex-
 “ press purview of the statute, in whose hand soever it shall
 “ come, and no more than the release of Faustin shall hurt after
 “ execution had by the conusee, no more shall it before execu-
 “ tion, for the rent was liable to execution presently, by the re-
 “ cognizance acknowledged. So if a man hath judgment to re-
 “ cover debt or damages, the rent which he hath of any estate
 “ of freehold is thereby liable to it; and therefore although
 “ after judgment he releases it, the plaintiff shall have execution
 “ of a moiety by *Elegit*, which is given by the statute of West.
 “ 1. (or 2.) c. 18. the words of which statute are: *liberent ei*
medietatem terræ debitoris; which by construction of law, is
 “ of all which he had at the time of the judgment given, or at
 “ any time after. And in Cheny's case, 27 Eliz. in the Court
 “ of Wards it was resolved, that where he in reversion did en-
 “ feoff lessee for years to the use of others, that although the
 “ lease would be surrendered and extinct by the common law,
 “ yet by the saving (b) of the statute of 27 H. 8. of Uses,
 “ the term of the feoffee was saved. Also in the same Court
 “ 28 Eliz. in one Ised's case it was resolved, that where the lord
 “ did enfeoff the copyholder to the use of others, that the copy-
 “ hold estate by the saving of the said act was preserved. So in
 “ case at bar, by the act *De Mercatoribus*, all the lands (which
 “ includes all hereditaments extendible) which the debtor had at
 “ the day of the recognizance acknowledged, shall be delivered;
 “ which act doth preserve the rent to be *in esse* as to the execu-
 “ tion of the conusee. And the case in 21(c) E. 3. 18 b. and (d) F.
 “ N. B. 223. I. is, if Lord and tenant Abbot be, and the Lord
 “ releases to the Abbot his seignior, it is *Mortmain* by the stat.
 “ *De Religiosis*, and the lord paramount shall have it by force of
 “ the said act, and yet the words of the act are *dominus feodi ta-*
litter alienati shall have it, and by the release it is extinct, and
 “ yet as to the lord paramount it is by construction of the act in
 “ *in esse*, and he shall have it. 3. It would be hard that the con-
 “ nuser by his own act should bar the conusee, who is a stranger
 “ to the release, of his execution of the rent, which perhaps was
 “ a chief cause of taking of the said recognizance to have execu-
 “ tion of it; and it is more reason to relieve the conusee in
 “ whom no fault or laches was, than the terretenant, who ought
 “ not to be misconusant of such charges of record. 4. Every ex-
 “ ecution hath in judgment of law relation and retrospect to
 “ the (e) judgment as appears in Shelly's case in the First Part
 “ of my Reports (A). And the said case of Dower, and the

By the recogni-
 zance acknow-
 ledged the rent
 was presently
 bound.

7 Co. 20. Co.
 Lit. 52. See
 Cro. Jac. 643.

(b) Moor. 126
 a. 2 And. 192,
 193. Winch.
 106, 109, 117.
 O. Bendl. 57.
 Ante 19 b. 20 a.
 Raym. 148.

(c) Fitz.
 Mortm. 12.
 (d) 3 Co. 31 a.

Every execu-
 tion hath in
 judgment of
 law relation to
 the judgment,
 (e) Co. 94 b.
 106 b. 10 Co. 38 a.

(A) The position in the text must be under-
 stood of freehold lands, &c. for at com-
 VOL. IV.

mon law a sale *bona fide* of chattels was
 good after judgment, though not after ex-
 K

[* 39 b.]

No action of debt lies so long as the extent endures.

After the annuity or rent determined, the person of the terre-tenant shall be charged in debt for the arrears.

Grant of a rent charge for life, the rent is arrear, and the grantor enfeoffs A., and the rent is again arrear, A. enfeoffs B. and the rent is behind in his time, the grantee dies, his executors shall have an action of debt against each for the rent behind in his time.

(a) Ant. 37 a. Dy. 205. pl. 7. (b) 1 Roll. 596. (c) 6 Co. 41 b. (d) Co. Lit. 146 b. 6 Co. 41 b.

grand *Cape*, and petit *Cape* thereupon, and the statute *De Mercatoribus*, which binds all the land of the conusor *that he had the day of recognizance acknowledged in whose hands soever it shall come, give a full and sufficient answer to all the said objections. And the opinion of a Serjeant *obiter* in 3 (a) and 4 Ph. and Mar. was utterly denied. As to the second point, it was resolved by the whole Court, that the action of debt (b) lies not so long as the Extent endures, for so long hath the rent continuance, although the freehold thereof be determined (B). And all that, as to this point, which was resolved in Ognel's case in the Fourth Part of my Reports, fol. 49. was affirmed to be good law : and 9 H. 7. 17 a. That if the lord grants his seignory for years, the grantee during the years shall not have an action of debt. And it was also resolved, that although there is an express (c) proviso, that the person shall not be charged in a writ of annuity, yet, in such case after the annuity or rent determined, the person of the terre-tenant shall be charged in debt for the arrearages, because the annuity is determined, and he hath no other remedy, as it is held in Ognel's case, and 6 Eliz. Dyer (d) 227. there cited. It was also resolved, that If a man grants a rent charge for life out of his land, and the rent is behind ; and the grantor enfeoffs A. and the rent is behind in his time : and afterwards A. enfeoffs B. and the rent is behind in his time, and afterwards the grantee dies, his executors shall have an action of debt

execution awarded, *Fleetwood's case*, 8 Rep. 171. By stat. 29 Car. 2. c. 3. s. 15. judgments as against purchasers for valuable consideration of lands, &c. are to be considered as judgments only from the time they are signed in the manner prescribed by s. 14.; and by s. 18. the day of the month and year of the enrolment of recognizances shall be set down in the margin of the recognizanceroll, and no recognizance shall bind any lands, tenements, or hereditaments in the hands of a purchaser *bona fide* and for valuable consideration, but from the time of such enrolment. The enrolment here meant is that directed by 27 Eliz. c. 4. By 7 & 8 W. 3. c. 36. judgments are to be docketed; and no judgment not docketed as directed by the act, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's, estates. To give effect to judgments, statutes or recognizances as against purchasers and mortgagees of lands in Middlesex and Yorkshire, they must be registered 5 Ann. c. 8. s. 4. except only such as shall be entered into

in the name and upon the proper account of his Majesty. By stat. 29 Car. 2. c. 3. s. 16. no writ of *fiery facias* or other writ of execution shall bind the property of the goods against which such writ of execution is sued forth but from the time that such writ shall be delivered to the sheriff, &c. to be executed. In the construction of which it has been held that the statute extends to protect purchasers only ; though the words seem general, and that therefore the goods are still bound from the day of the signing the judgment and the *teste* of the writ against the party himself and all other persons, note (8). *Wheatly v. Lane*, 1 Saund. 219 f. 2.

The meaning of the expression that the goods are bound is not that the property in them is altered, but that the defendant, from the time that they are bound, cannot dispose of them except in market overt so as to prevent their being taken in execution, *Payne v. Drewe*, 4 East. 539. For the cases upon these statutes, vid. Bac. Ab. Execution, 1 Tidd's Practice, 8th Ed. 968. *et seq.* notes to *Harbert's case*, Vol. II. p. 430.

(b) Vid. note (a) *Ognel's case*, Vol. II. p. 412.

against each of them, for the rent (*a*) behind in his time. For (*a*) 4 Co. 49 b.
 (*b*) *qui sentit commodum sentire debet et onus*, as it is also held Co. Lit. 162 b.
 in Ognel's case. (*b*) 1 Co. 99

100 a. Co. Lit. 231 a. 2 Inst. 489. Cart. 142. 3 Keb. 592. Plowd. 249. 4 Co. 49 b. 26 E. 3. 64.

BEDELL'S CASE.

[40 a.]

Mich. 5 Jacobi.

In the King's Bench.

A. seised in fee of a messuage, &c. by indenture *tripartite*, between himself and his wife of the first part, his second son of the second part, his third son of the third part, in consideration of the natural affection, and paternal love which he had to his said sons, and for their better advancement, and that the said tenements should continue in his name and blood, covenanted that he and his heirs would stand seised to the use of himself for life, and after his death to the use of his wife for life, and after their deaths, of one moiety to the use of his second son in tail, and of the other moiety to the use of his third son in tail, and afterwards A. died; adjudged that a use arose to the wife for her life.

BEDELL
 v.
 BEDELL.
 Pt. VII.—40 a.

A consideration which stands with the deed, and is not repugnant to it, may be averred.

A father covenants to stand seised to the use of his son, and a sum of money is mentioned as the consideration; no other consideration shall be intended.

Upon writ of error brought the judgment was affirmed. S. C. Jenk. Cent. 289.

HIL. 1 Jacobi, Rot. 375. in the King's Bench. Between Eliz. Bedell plaintiff in debt, and Michael (*a*) Bedell defendant, the case was such. Robert Bedell seised of a messuage, &c. in Iver and Langley in the county of Bucks in fee, by the said Eliz. his wife had issue three sons; James was the second son, and Michael the defendant the third. The said Robert by indenture *tripartite*, between him and his wife of the first part; the said James his second son of the second part; and the said Michael his third son of the third part, in consideration of the natural affection and paternal love which he had to the said James and Michael, and for their better preferment and

(*a*) 2 Roll. 782,
 785, 11 Co. 24 b.
 25 a.
 1 Jones 419.
 2 Jon. 105.
 March 50, 51.
 4 Ves. 792.

advancement, and to the intent that the same tenements should continue in his name and blood, covenanted by the said indenture, that he and his heirs would stand seised of the said tenements to the use of himself for life; and after his decease to the use of the said Elizabeth his wife for life, and after their deceases, of one moiety to the use of the said James in tail, and of the other moiety to the use of the said Michael in tail, &c. and afterwards Robert died, and all this matter was found by special verdict. And the sole question was, whether (as the case is) any use arose to Elizabeth his wife, or not. And it was objected, that the wife was not within the considerations which were expressed in the indenture; and no other consideration can be averred than is contained in the deed, for the whole substance of the agreement of the parties was referred to the deed, and the whole ought to appear therein, and nothing is left to the word or averment of the parties. To which it was answered and resolved, that a consideration which stands with the deed, and is not repugnant to it, might be well (a) averred, as it is adjudged in 3 and 4. Phil. and Mar. Dyer 146. in (b) Viller's case; which see in the First Part of my Reports in Mildmay's case, 176 a. 2. Admitting that other consideration than what is expressed in the deed could not be averred, yet in this case there is an express (c) consideration: for when he limits it to the use of his wife for term of her life, that imports a sufficient consideration in itself; and there needs not any averment; for (d) *manifesta probatione non indigent*, at in 13 H. 4. 17 a. where the stat. Westm. 1. cap. 38. ordains, that the writ of assise of Mortdauncester shall have the term of limitation from the coronation of King H. 3. there it is held, that if an infant brings an assise of Mortdauncester of the possession of his father or mother, (c) he need not allege that it was after the coronation of King Henry 3. for it appears. So if the father, tenant by Knight's service, enfeoffs his son and heir apparent within age, it need not be averred to be by (f) collusion, for it is apparent. Wimbish's case, Plowden's Commentaries, and 27 H. 8. Dacre's case, 33 H. 6. 14. 33 H. 6. 32. *et quedam tacita habentur pro expressis*. So if I covenant that in consideration of paternal love and affection to my eldest son, to stand seised to the use of my eldest son for life or in tail, and afterwards to the use of my second son in tail, and afterwards to the use of such one my cousin in fee, although the consideration expressed in words respects only the eldest son, yet the consideration apparent in the deed, in limiting the use to my second son, or my cousin, is sufficient in law to raise the use. So if I covenant to stand seised to the use of my wife, son (g), or cousin, it shall well raise an use without any express words of consideration: for sufficient consideration appears, and paternal love and affection appear. But if the father by deed indented in consideration of an hundred pounds paid by the son, covenants to stand seised to the use of his son, there no use shall be raised

(a) 2 Roll. 790.

1 Co. 176 a.

2 Co. 76 a.

5 Co. 26 a. b.

68 b. 9 Co. 10

a. b. 11 Co. 25.

8. Cr. Jac. 29.

1 Roll. Rep.

42. 2 Roll.

Rep. 362, 363.

Lane 119. 1

[* 40 b.]

And. 318. 1

Brownl. 191.

Moor 192.

Dy. 147. pl. 72,

73. 1 Vent.

368.

(b) 4 Co. 3 b.

11 Co. 25 a.

2 And. 47.

N. Benl. 39.

Benl. in Kelw.

208. 2 Roll.

781. 2 Roll.

Rep. 68. 2

Inst. 672. Ow.

33. Raym.

47, 50. Cart.

140. Palm.

214, 215, 506,

507. Moor 93,

595.

(c) 11 Co. 34 b.

25 a. 2 Roll.

782, 785. Jenk.

Cent. 289.

Cro. Jac. 168.

624, 625.

(d) 11 Co. 24,

25 a.

(e) 8 Co. 126 b.

9 Co. 54 b.

Doct. pl. 86.

Br. Mortdan. 8.

(f) Plowd. 49 b.

(g) Roll. Rep. 68.

Plowd. 304 a. 1

And. 79. Cro. Jac. 624.

Cro. Car. 530. 8

Co. 94 a. 1 Jones

419.

† 3 Co. 94 a. 11

Co. 24 b. 25 a.

1 Vent. 138.

Cart. 138, 146.

Palm. 214, 215.

Winch. 59, 60.

to the son, (a) unless the deed be enrolled, by the statute of 27 H. 8. cap. 10. For it is in the nature of a bargain and sale, and there (b) *expressum facit cessare tacitum*. And afterwards on this judgment a writ of error was brought the same term on the (c) new statute; and by all the Justices of the Common Pleas, and Barons of the Exchequer, the judgment was affirmed. *Quod nota bene* (A).

(a) 3 Mad. 363.
Touch. 511.
(b) Co. Lit.
183 b. 5 Co.
97 a. 11 Co.
24 b. Godb.
449. Latch.
265. Raymond
46. Cart. 146.
(c) 27 El. e. 8.

(A) Vid. note (g). *Mildmay's case*, Vol. I. p. 417. and note 1. *Chester v. Willan*, 2 Saund. 96 b.

BERESFORD'S CASE.

[41 a.]

Mich. 5 Jacobi.

Feoffment to A. and others to the use of C. for life, and after some intermediate uses to the use of B., and of the heirs male of the said B. lawfully begotten, and for default of such issue over. Held, B. took an estate tail.

In all gifts and limitations of uses; to create an estate tail, it is requisite, either by express words or by words which are tantamount, to limit that the heirs be procreated or begotten on some body in certain.

The precise words of the body are not necessary to the creation of an estate tail, if there are words which are equivalent.

If lands be given to one *et hæredibus de se ex euntibus*, he shall have an estate tail.

BERESFORD
v.
BERESFORD
and
Another.
Pt. VII.—41 a.

In the Court of Wards between James Beresford relator, and Thomas Beresford and others, defendants, the case was briefly such; Aden Beresford being seised of the manors of Fennibently, Bircham, and other lands in fee, by his deed, 14 Junii, 40 Eliz. did enfeoff William Fleetwood and others in fee to the uses of certain indentures bearing date the 29th of November 34 Eliz. *scil.* to the use of the said Aden the father, "for term of his life, and after his decease to the use of George Beresford son and heir apparent of the said Aden, and the heirs males of his body lawfully begotten; and for default of such issue, to the use of Aden Beresford, son of James Beresford, and of the heirs males of the said Aden, son of the said James, lawfully begotten, and for de-

Cr. Jac. 448,
591. 2 Roll.
Rep. 196, 217.
Lit. Rep. 320,
347. Hutt. 85.

2 Salk. 620, &c.

[*41 b.]

(a) Moor 424.
Lit. Rep. 287,
347. El. 478.
Hutt. 86.

(b) Litt. s. 31.
Co. Lit. 27 a.

(c) Hutt. 85.
Cr. Jac. 448.
591. 2 Sid. 42.

“ fault of such issue, to the use of the heirs males of the body
“ of the said James Beresford, lawfully begotten; and for
“ default of such issue, to the use of Thomas Beresford,
“ third son of the said Aden, and of the heirs males of the
“ body of the said Thomas lawfully begotten; and for de-
“ fault of such issue, to the use of Humphry Beresford,
“ fourth son of the said Aden, and of the heirs males of his
“ body, lawfully begotten, with divers remainders over, and
“ with remainder to the heirs females of the body of George,
“ and so of Aden, the son of James, lawfully begotten, &c.
“ with the remainder, to the right heirs of Aden the father
“ for ever.” And the only question of the case was, what
estate Aden the son of James had? and this case was twice
argued before the two Chief Justices, and Chief Baron at
Serjeants’ Inn. And it was objected, that Aden the son of
James had not fee-tail but fee-simple; for the limitation to
him is, “ to the use of Aden, and of the heirs males of the
“ said Aden lawfully begotten;” and here want these words
“ of the body” of the said Aden, so that now the limitation
is in effect, “ only to the use of Aden, and the heirs males of
“ the said *Aden,” for the subsequent words (lawfully be-
gotten) are implied: for every heir ought to be lawfully be-
gotten. And a limitation to one, and to his heirs males, is
without question a fee-simple. And a judgment in the King’s
Bench between (a) Abraham and Trigge, Hil. 38 Eliz. Rot.
799. was strongly urged, where a feoffment was made to the
uses of certain indentures (as this case is) where one limita-
tion was *ad opus et usum Gabrielis Dormer et hæredem masculo-
rum suorum legitime procreatorum et pro defectu talis exitus*, to
the use of divers others in tail in remainder: and upon argument
at the bar and bench, it was adjudged that Gabriel had a fee-
simple; for it is not limited of what body the heirs males
should be begotten, but his intent was, *quod singuli hæredes
sui masculi* should inherit, which intent did not stand with the
rule of law; and although a remainder be limited over, which
could not be upon a fee simple, yet that could not against the
rule of law make words of fee simple to be converted to an
estate tail. And they concluded with Litt. fol. 6 b. that the
reason wherefore when lands are given to one and his heirs
males or female, it is a fee-simple, is, because it is not limited
by the gift of (b) what body the issue male or female shall be
begotten, and so cannot in any manner be taken by the equity
of the statute *De Donis Conditionalibus*, and therefore it is a
fee-simple. So in the case at bar; and therewith agrees 8 E.
3. 49. where lands were given to one *et hæredibus suis legiti-
mis*, the same is fee-simple, which is all one with a limitation
to one *et hæredibus suis legitime procreatis*. But it was an-
swered and resolved by the said Chief Justice and Chief
Baron (c), that the said Aden son of the said James had an
estate tail, by which all the remainders over were lawfully
vested: for it was agreed that to an estate in tail is requisite
in all gifts and limitations of uses, that the heirs be limited to
be procreated or begotten on somebody in certain, either by

express words, or by words which are tantamount; (a) for these precise words (*de corpore*) are not necessary to the creation of an estate tail, so long as there are words which are equivalent; as in (b) 5 H.5. 6 a. b. where the gift was *Dedi unum messuag' R. et K. uxori ejus et hæredib' eor' et aliis hæredib' dict' R. si dict' hæred' de R. et K. exeuntes obierint sine hæredibus de se*. In that case, these words (*de corpore*) are omitted; and yet it was adjudged a good estate tail, for there are words which are equivalent; for the gift in effect is to the husband and wife, and to the heirs of the husband and wife begotten or of the said *R. et K. exeunt'* or *hæredib' de se*, and all this is by force of this preposition (*de*) and (issuing). And in (c) 12 H. 4. Brev. land was given to one *et hæredib' quos sibi contigerit habere de uxore sua*, here wanted the words (*de corpore*) yet because it doth amount to as much, it is adjudged an estate tail. And 3 Edward 3. Brev. 743. (d) land is given to one *et hæredibus suis de prima uxore sua*, it is a good estate-tail. And it was resolved, if land be given to one *et heredibus de se exeuntibus*, that it is a good estate tail. And in these cases, the principal cause is by force of this preposition (*de*.) And divers other cases were put, for which cause it was concluded, that either words (*de corpore*), or which are equivalent, are requisite to the creation of an estate-tail. And it was resolved in the case at bar, there were words which were equivalent; for by the statute *De Donis conditionalibus, voluntas donatoris in charta doni sui manifestè expressa de cætero observetur*; and therefore in this case such construction shall be made as will produce three effects:— 1. To stand with the rule of law. 2. With the intent of the donor. 3. That all the parts of the indenture may stand together. And therefore translate the said limitation to Aden into Latin, and then the limitation is, *ad usum Adeni et hæredum masculorum de dicto Adeno legitime procreatorum*, or *et hæred' masculorum legitime procreatorum de dicto Adeno*, which is as much as if he had said, *per dict' Adenum legitime procreat'*; for it is all one in effect: for this word (*de*) or (*ex*) coupled with the word subsequent *procreat'* doth appropriate the heirs males to be of the body of Aden; for *de Adeno*, or *ex Adeno*, and *de corpore Adeni*, are all one. And that is directly proved by the judgment in the said case of (e) 5 H. 5. 6 a. b. For there was (*de*) and (*exeunt'*), and here is (*de*) and (*procreat'*) which are all one in effect. And in the said case of Abraham (f) and Trigge there wanted (*de*.) And as to that it was objected, that the limitation in Latin might well be, *ad usum dicti Adeni et hæredum masculorum dicti Adeni*, (in the genitive case) *legitime procreat'*, and not (*de dicto Adeno*), or if the limitation be not certain to make an estate tail, there are words certain enough to make an estate in fee. To which it was answered and resolved: 1. It ought to be, *de dicto Adeno*; for otherwise it would be against the meaning of the donor, and all the remainders over would be void; and always such (g) construction ought to be made, that all the parts of the deed may stand together, if it may

(a) Lit. Rep. 6.
2 Sid. 73. Cr.
El. 40. Co. Lit.
27 b.

(b) Perk. s. 169.
2 Roll. Rep.
196. Lit. Rep.
260, 320.

Bridgm. 2. Br.
Tail 12. Br.
Estates 62.
Fitz. Tail 11.
Co. Lit. 20 b.
1 Bulstr. 222.

(c) Cr. Jac.
591. Co. Lit.
20 b.

(d) Co. Lit. 20
b.

[* 42 a.]

(e) Cr. Jac. 591.
Perk. sect. 169.
Antea 40 b.
2 Roll. Rep. 196.
Lit. Rep. 260,
320. Bridgm. 2.
Br. Estates 62.
Fitz. Tail 11.
Co. Lit. 20 b.
1 Bulstr. 222.
(f) Moor 424.
Antea 40 b.
Lit. Rep. 287,
347. Cr. El. 478.
Hutt. 86.

(g) Wing. Max.
236.

stand with the rule of the law. 2. The subsequent clause is, "and for default of such issue;" and issue cannot be of Aden, unless the words be (*de dicto Adeno*), and therefore one clause is well explained by the other. And according to this resolution the case was decreed accordingly. *Vide* 35 (a) Assise pla. 14. (b) 37 Ass. pla. 14 (c) 39 Ass. pla. 20. 24 Edw. 3. 28. 18 Ed. 2. Brief 836 (A).

(a) Fitz. Tail 17.
Br. Estates 36.
Br. Tail 20.
(b) 1 Roll. 836.
Perk. sect. 171.

Cr. Jac. 591. 37 Ass. pl. 15. Br. Estates 61. Br. Tail 21. (c) 39 Ass. pl. 20. Br. Estates 38. Br. Tail 23. Fitz. Tail 19. Co. Lit. 20 b. 22 a. Cr. El. 153, 313. Owen 148. 1 Ventr. 228. Palm. 33.

(A) "But devise to one *et hæredibus legitime procreatis* is tail. H. 43 Eliz. c. B. Rot. 1408. *Moore's case* 711; but *contrà*, by act executed 7 Rep. 41 b. *Dormer's case*. "If lands be limited by deed to the use of J. S. *et hæredum masculorum suorum legitime procreatorum* remainder over, it is a fee simple; but if it be *hæredum masculorum de se*, or, in English, the heirs of him lawfully begotten, especially where there is a remainder over, it is a tail, 7 Rep. 41. *Bedell's case*; *Dormer's case*, H. 38 Eliz. B. R. Rot. 739. Hal. MSS." Hargrave's Note 2. Co. Litt. 20 b.

Lord C. J. Willes has said (*Goodright v. Goodridge*, Willes. 374.) that this case can hardly be cited as an authority in any case whatever, unless a deed of uses should happen to be penned exactly in the same words.

The general rule is, that by the words "heirs" in a deed is meant heirs general: but the word may be used in the sense of heirs of the body, when the necessity of the case requires it. *Vid. Idle v. Cook*, 2 Salk. 621. S. C. 2 Lord Raym. 1144; *Doe v. Smeddle*, 2 Barn. and Ald. 126; *Nanfan v. Legh*, 7 Taunt. 85. S. C. 2 Marsh. 107. Cruise's Dig. Vol. IV. p. 299. 3rd edition.

[42 b.]

KENN'S CASE.

Mich. 4 Jacobi.

ROBERTSON
v.
STALLENGE.
Pt. VII.—42 b.

A. seised of a manor held by knight's service *in capite*, 37 H. 8., took to wife *de facto*, B. who had issue C. 2 P. and M. in the court of audience, between A. plaintiff, and B. defendant, sentence was given, that at the time of the contract and solemnization of matrimony, the parties were not, or one of them was not, of an age to contract, and that the marriage was a nullity, and a divorce was decreed, and that the parties should be at liberty *ad alia vota convolvenda*. After the divorce A. married D.; 5 Eliz. before divers commissioners ecclesiastical D. libelled against A., that he, before the marriage contracted betwixt them, had married B., whereupon process was awarded against B. *pro interesse*; and upon due examination, &c. there was a sentence, that the marriage between A. and D. was lawful, and they were sentenced *ad exequenda conjugalia obsequia*, and that A. was never lawfully married to B. Afterwards D. died, and then A. married E. by whom he had

issue one daughter F. and died. 36 Eliz. it was found by office, by force of a *mandamus*, after the death of A. that F. was daughter and heir of A., and that she was within age, *sc.* of the age of ten months, the Queen granted the wardship and custody of F. to G. and E., then the wife of G., C. pretending to be daughter and heir of A. and her husband H. exhibited their bill in the Court of Wards against G. and E., surmising that C. was daughter and heir of A. on the body of B. his lawful wife, alleging that they at the time of their marriage were both of them above the age of consent, and that they cohabited together nine or ten years before the said supposed divorce, during which cohabitation the said C. was gotten betwixt them, and prayed that the said C. and H. might traverse the office. To which G. and E. answered, and C. and H. examined divers witnesses, and before publication G. died, C. and H. exhibited a bill of revivor against E., and afterwards C. having issue, K. who married L. died, after whose death K. and L. brought a new bill of revivor to revive the first suit; and, upon reference to many of the Judges, it was resolved,

1. That the said divorce, so long as it remains in force, is binding, and that the said K. and L. shall be concluded by it. 2. The not finding an office for the said K. and L. disables them to traverse the office found. 3. The bill of revivor on the bill of revivor is not maintainable. S. C. [Cro. Jac. 186. Jenk. Cent. 289.]

IN the Court of Wards between Thomas Robertson, and Elizabeth his wife, plaintiff, and Florence Lady Stallenge, defendant, the case was such. Christopher Kenn, Esq. was seised of the said manor of Kenn, in the county of Somerset, held by knight's service *in capite* (A) and 37 Hen. 8. *de facto* took to wife Elizabeth Stowel, and afterward the said Elizabeth Stowel had issue Martha, mother of Elizabeth, one of the now plaintiffs; and afterwards 1 and 2 P. and Mar. in the Court of Audience, between the said Christopher Kenn, plaintiff, and Elizabeth Stowel, defendant, the Judge there gave sentence in these words: *Prætens. tractat. contract. sponsalia, et matrimonium, quin verius effigiem matrimonii inter C. Kenn et El. Stowel in minore et sud impubertatis ætate eorundem aut eorum alterius de fact' habit. contract. et celebrat. fuisse et esse, eodemque Christophorum et Eliz. tam tempore contractus, et solemnizationis dict' præpens. matrimonii, quam etiam continuo postea eidem matrimonio præpens. et solemnizationi ejusdem dissensisse, contravenisse, reclamasse et reluctasse, ac eo prætextu hujusmodi præpens. tractat. contract. sponsalia et matrimonium de jure nullum et nulla, irritum et irrita, cassum et cassa, invalidum et invalida, et minus efficax et inefficacia fuisse et esse, viribusque juris caruisse, carere, et carere debere; necnon ante dictos Christ. Kenn et Eliz. Stowel, quatenus de facto fuer' ad invicem matrimon. ut prædicitur copulat', ad invicem separand. et divorciand. fore debere pronunciamus, decernimus, et declaramus, eosque separamus et divorciamus, eisdem-*

1 Roll. 360 H. 3.

(A) Knight's Service, the Court of Wards, &c. abolished. Stat. 12 Car. 2. c. 24.

[* 43 a.]

que Christophoro et Eliz. licentiam et libertatem ad alia vota concolanda concedimus, tribuimus, et impertimur per hanc sententiam nostram definitivam, sive hoc finale nostrum decretum, quam sive quod ferimus et promulgamus in hiis scriptis, etc. And after the said divorce the said Christopher Kenn married and took to wife Elizabeth Beckwith. And afterwards, anno 5 Eliz. before divers commissioners ecclesiastical, *the said E. Beckwith did libel against the said Ch. Kenn, that he (before the marriage contracted betwixt them) had married with the said E. Stowel, whereupon process was awarded against the said E. *pro interesse*, and on due examination of the cause there was a sentence, that the marriage betwixt the said C. Kenn and E. Beckwith was lawful, and sentenced them *ad exequenda conjugal' obsequia, &c.* And that the said C. Kenn was never lawfully married to the said E. Stowel; and afterwards the said E. Beckwith died, after whose death the said C. Kenn married the said Florence, by whom he had issue one daughter E. and died; and ann. 36 El. it was found by office in the county of Somerset, by force of a *Mandamus*, after the death of the said C. Kenn, that the said E. Kenn was his daughter and heir, and that she was within age, *sc.* of the age of ten months. The wardship and custody of whom the Queen granted to Sir N. Stallenge, and the said Florence then his wife: whereupon the said Martha pretending herself to be daughter and heir to the said C. Kenn, with her husband Silv. Williams exhibited their bill in the Court of Wards against the said Sir N. and Florence, surmising that the said Martha was daughter and heir of the said C. Kenn on the body of E. Stowel his lawful wife (as she pretended alleging that they at the time of their marriage, *in an.* 37 H. 8. were both of them above the age of consent, and that they did cohabit together nine or ten years before the said supposed divorce, during which cohabitation the said Martha was gotten betwixt them, and prayed leave that the said Sil. and M. might traverse the said office. To which the said Sir N. and Florence answered, and the plaintiff examined divers witnesses, and before publication Sir N. died; and thereupon the said Sil. and M. exhibited a bill of revivor against the said Florence, and afterwards M. having issue El. wife of the now plaintiff died, after whose death the said T. Robertson and El. his wife brought a new bill of revivor to revive the first suit, in which the witnesses were examined. And this case was referred to Fleming and Coke, Chief Justices, and to Tanfield, Chief Baron, and to Yelverton and Williams, Justices, and Snigg and Altham, Barons of the Exchequer. And in this case three questions were moved: 1. If against the first divorce the plaintiffs should be received, so long as it remained in force, to aver, that they did agree and consent to the marriage; or that they should be concluded by the said divorce. 2. The second question was if they should have a traverse to the said office before an office found for them. 3. If they should have a bill of revivor upon a bill of revivor, as this case is, and the Justices heard many arguments before them, at several days and in several terms,

at Serjeants' Inn. And as to the first it was objected, that it appears by *Lit. lib.* 2. fol. 22. and by the stat. of Merton, c. 6. and 35 H. 6. 40 b. &c. That the common law and Parliaments have taken notice of the age of consent of the male to be (a) fourteen, and of the female *to be twelve; and therefore it is triable at the common law. And if in truth the husband and wife are of age of consent at the time of the marriage, no divorce after, pretending that they were within age of consent, shall conclude the parties or their heirs, but they may prove the contrary at the common law, and chiefly in the case at bar, because it concerns inheritance and the true descent thereof; *et sententia contra matrimonium nunquam transit in rem judicatam*. 2. Admitting that they were within age of consent, and after age of consent they assent or cohabit, and have issue, although a divorce for impuberty and minority of years he had, yet it is but evidence, and shall not conclude the parties in any action at the common law to prove the assent; for inasmuch as the divorce is had for that cause, and the cause is triable by the common law, the divorce shall not conclude. And 11 H. 7. 27 a. was cited, that he who pleads a divorce ought to shew the cause of the divorce; and if the cause be triable at the common law (as it is in the case at bar), there it shall not conclude; but if it be a thing not triable at the common law, as a precontract, profession, &c., there it is otherwise. But as to that it was resolved by all the said Justices and Barons, that the said sentence should conclude as long as it remained in force (a), and that for divers causes. 1. The Ecclesiastica! (b) Judge hath sentenced the contract and marriage to be void and of no effect, and although they were of the age of consent; yet if the original contract was void, and of no effect, then there was just cause of divorce. 2. There were words of divorce and separation, *eosd' divorciamus et se-*

of divorce and separation gives each liberty *ad alia vota convalenda*. 3. If the marriage had been *infra aunos nuptiles*, the Ecclesiastical Judge is judge as well of the assent as of the first contract. Credit is to be given to the sentences of ecclesiastical courts, in things of which the cognizance belongs to them. (b) Cr. Jac. 186.

* [43 b.]
(a) Lit. sect.
104.
Co. Lit. 79 a. b.
2 Inst. 90.

1. The ecclesiastical judge has sentenced the contract and marriage to be void and of no effect, and so there was just cause of divorce.
2 The words

(a) Where in civil causes the temporal courts find the question of marriage directly determined by the ecclesiastical court, they receive the sentence as conclusive proof of the fact, it being an authority accredited in a judicial proceeding by a court of competent jurisdiction. They receive it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. A sentence of nullity, therefore, and a sentence in affirmance of marriage, have been received as conclusive evidence, on a question of legitimacy, arising incidentally upon a claim to a real estate. So a sentence in a cause of jactitation has been received as evidence against a marriage, upon a title in ejectment, and in personal actions immediately founded on a supposed marriage. In all these cases, said

C. J. De Grey, the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties, and who had acquiesced. Judgment of De Grey, C. J. 11 State Trials 261. 1 Phillips on Evidence 322. 5th edit. *Sinclair v. Sinclair*, 1 Hagg. Rep. 294. A marriage established by the sentence of a foreign court, having proper jurisdiction, is also conclusive, per Lord Hardwicke, 1 Ves. 159. But a sentence in a cause of jactitation, although it is evidence against a marriage upon a title in ejectment, and in personal actions immediately founded upon a supposed marriage, is not like a sentence of nullity conclusive, 11 St. Tr. 261.

(a) Jenk. Cent.
289.

The cause of
the divorce
ought to be
shewn.

(b) Jenk. Cent.
289. 4 Co. 29 a.
2 Roll. 7.
5 Co. 7 a.
Caudry's case.
8 Co. 135 b.
2 Ventr. 43.
Cawly 31.

(c) 1 Sid. 71,
[* 44 a.]

251.
Acc. Skinn. 485.
Corbet's case.
(d) Br. pleading
37.
Fitz. Brief 175.
(e) Fitz. Bar. 96.
Br. Abbe et
Prior 14.
Br. Pleadings
123.

1. If R. and M.
had had issue,
they might
have sued in
the Ecclesiasti-
cal Court to
avoid the di-
vorce.

(f) Jenk. Cent.
289. 4 Co. 49.
2 Roll. 7.
5 Co. 7 a.
Caudry's case,
8 Co. 135 b.
2 Ventr. 43.
Cawly 31.

paramus; and gives each of them liberty *ad alia vota con-
landa*. 3. If the marriage had been *infra an. nubiles*, the Ec-
clesiastical Judge is judge as well of the assent as of the first
contract, and what shall be a sufficient assent or not; and
although the Ecclesiastical Judge shews the (a) cause of his
sentence, yet forasmuch as he is judge of the original matter,
sc. of the lawfulness of the marriage, we will never examine
the cause, whether it be true or not; for of things (the cogni-
zance whereof belongs to the Ecclesiastical Court), we ought
to give (b) credit to their sentences, as they give to the judg-
ments in our Courts. Also the rule of their law is, *quod mas-
culi quidem puberes feminae viri potentes matrimon' consentiri
possunt*; and the determination thereof doth belong to their
cognizance. And as to the case of 11 H. 7. 27 a. it is true,
that the cause of the divorce ought to be shewed, because
some divorces dissolve the marriage, *sc. a vinculo matrimonii*,
bastardise the issue, and bar the wife of her dower, and some a
mensd et thoro, which do not dissolve the marriage, nor bar the
wife of dower, nor bastardise the issue; but in the case of de-
privation the (c) cause need not be shewed, for be it right or
wrong, upon cause or without cause, it stands, and every de-
privation disables and removes the party deprived, as well for
one cause as for another, as long as the deprivation remains
*in force. *Vide* 8 Ass. 9 (d) E. 4. 24 a. 7 E. 4. (c) 32 a. 3 H.
6. 12 H. 8. 5. And Coke C. J. cited the case in 22 E. 4. Tit.
Consultat. 5. Corbet's case, where the case was, that Sir R.
Corbet had by El. his wife two sons, Robert the elder, and
Roger the younger, and died; Robert the elder being within
the age of fourteen years, took one Maud to wife, and at full
age they cohabited together, *et habuerunt carnal. copulam, et
cogniti et reputati pro viro et uxore palam*; and afterwards the
said Robert put away the said Maud his wife, having no issue
by her, and married one Lettice, &c. living the said Maud,
and had issue Robert by her; and afterwards Robert,
who so married Lettice, died, and Lettice declared pub-
licly that she was the lawful wife of Robert, and her son a
mulier; for which the said Roger the son of the said Sir Robert
Corbet sued in the Spiritual Court to reverse the marriage be-
tween Robert his brother and Lettice, and that Lettice be put
to silence: for which cause Lettice sued a prohibition. And
in that case three points were resolved. 1. That if Robert
and Maud had had issue and had been unjustly divorced, and
afterwards Robert had married Lettice and had issue and died,
the issue of Robert and Maud might sue in the Ecclesiastical
Court to avoid the divorce; for so long as the divorce stood in
force (the common law gives so great credit (f) to it) the issue
could not have remedy by the common law. And note in the
case no cause of the divorce doth appear, but because the mar-
riage was had when the parties were *infra annos nubiles*; and
in the said case of divorce, the issue shall have his suit to re-
verse it originally in the Spiritual Court; for the divorce is a
spiritual judgment, and ought to be reversed in the Spiritual
Court. But in the case of Corbet there is no divorce, nor

other spiritual judgment that should disable the said Roger; and therefore he ought originally to begin at the common law as heir, and he shall have all actions in the temporal court as heir, and all benefits as heir against the issue of Lettice notwithstanding the second marriage; for that is void in all laws temporal and spiritual, and the action and original to bastardize any shall not be moved originally in the Spiritual Court, when no spiritual sentence doth disable him: but he shall begin in the temporal court, and then, if need be, they shall write to the spiritual Judge, if general bastardy be alleged; and the reason thereof is, because a man may be a bastard in the temporal law, and *mulier* in the spiritual law, and *e converso*. As a man who is begotten in adultery during the coverture is *mulier* by the temporal law, and bastard by the spiritual law. And if a man (*d*) beats a clerk, if he sues in the Spiritual Court to excommunicate him for the offence, he doth well: but if he sues there to have amends, he shall have a prohibition. 2. It was resolved in the said case of Corbet, that when the Spiritual Court shall have jurisdiction, the whole cause ought to be spiritual: as if a parson libels against a layman for taking away his tithes, the temporal court shall have jurisdiction, for it is mixed with the temporality: and in the same case the matter *is mixed (by consequence) with the temporality, *sc.* that the one is heir, and that the other is a bastard; but if the said case of tithes be between parson and parson, or between a parson and a layman, if the right of tithes comes in question, the Spiritual Court shall have the jurisdiction (*c*). See the statute *De circumspecte agatis*, where it is said that (*a*) *mere spirituali* belong to the ecclesiastical cognizance. And Linwood, *cap. De foro competent'*. fo. 7. saith, *mere spiritualia sic dicta, quia non habent mixturam temporalium*: and where the said act saith, *de mortali peccato*, Linwood expounds it, and saith, *non (b) intelligas de omni peccato mortali, sed de tali cujus punitio de sua natura spectat ad forum ecclesiast'*: *nam si de ratione cujuslib' peccati mortali cognosceret ecclesia, sic periret temporal' gladii jurisdictio, cum vix esset dare caus. quin ratione peccati possit deferri ad eccles'*. 3. It was resolved in the said case of Corbet, that when the whole cause is originally spiritual, yet if after in the Spiritual Court they are to try a temporal consanguinity, a prohibition shall issue; as if one parson saith, that the place is within his parish, and the other contrary, after such matter shewed a prohibition shall issue (*b*); and therewith agree 39 E. 3. 23. et (*c*) 5 H. 5. 10 b. Note, reader, a good difference between a repeal of a sentence of divorce given in the life of the parties, and to give sentence of divorce after the death of the parties. For it appears by the said case of 22 E. 4. that a sentence of divorce may be repealed in the Spiritual Court by a suit there after the death of the parties; but if any

See 1 Ric. 3, 4 a. pl. 7.

When the Spiritual Court shall have jurisdiction, the whole cause ought to be spiritual.
(*d*) F. N. B. 51.
[* 44 b.]
K. 52 l. 12 H. 7.
23 a. 4 Co. 20 b.
5 Co. 51 a.

(a) 2 Inst. 488.

(b) 2 Inst. 488.

When the whole cause is originally spiritual, yet if after in the Spiritual Court they are to try a temporal consanguinity, a prohibition shall issue.

(c) Fitz. Jurisdiction 39.
Br. Juris. 30.

(c) Acc. *Cheeseman v. Hoby*, Willes 680.

(d) Acc. *Rutler v. Yateman*, 1 Sid. 89. S.C. *Drake v. Taylor*, 1 Strange 87. Com. Dig. 1 Lev. 78. Com. Dig. Prohibition. F. 14. Prohibition, G. 6.

A divorce after the death of any of the parties, or a sentence declaratory that the marriage was void after the death of any of the parties, shall not bind them.

[* 45 a.]

2 Inst. 688,
689, &c.

of the parties be dead before any divorce sentenced in the Ecclesiastical Court, there they cannot sue in the Spiritual Court to declare the marriage void, and to bastardize the issue (E). For the trial doth originally belong to the King's Court, where no disability is by sentence in the Spiritual Court; and therewith agree 39 Ass. p. 10. 39 E. 3. 31. and 24 H. 8. Tit. Bastardy 44 b. That a divorce after the death of any of the parties, or a sentence declaratory that the marriage was void after the death of any of the parties, shall not bind them; for it is but in effect to bastardize the issue, of which they have not originally cognizance, as hath been said. *Fide* 19 Ass. p. 2. that if two be married *infra annos nobiles*, and after the full age a divorce be between them, it dissolves the marriage; for there the wife brought an assise against her husband: see Bury's case in the Fifth Part of my Reports, fol. 98. and see Cawdry's case in the same book, and see Bunting's case in the Fourth Part of my Reports, fol. 29. and 11 H. 7. 9. 34 H. 6. 14. 12 H. 8. 5. As to the second point it was objected, that the plaintiff should have a traverse without any office found for him; for when a direct and sufficient office is found in one county by force of a *Diem clausit extremum*, or *Mandamus*, after the death of the ancestor there shall never be an office found again for the same land, as long as that stands in its force; for otherwise the law would never have an end: and therewith agree 4 H. 4. (or 7) 15. 14 E. 4. 5. 15 E. 4. 11. 2 E. 7. 12. 18. and therefore it would be hard to compel him to find an office for him, *before he can traverse; where by the law he cannot find in such case any office. 2. It was objected that the statute of 2 E. 6. c. 8. hath remedied it if any office were requisite by the common law, the words of which act are—
“And whereas one person or more is or shall be found heir to
“the King's tenant by office where any other person is or shall
“be heir, or if one person or more be or shall be found heir
“by office in one county, and another person or persons is or
“shall be found heir to the same party in another county, &c.
“be it enacted, that every person grieved by any such office
“shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed and

(E) Acc. Co. Litt. 33 a. *Morris v. Webber*, Moor 228. *Hinks v. Harris*, 2 Salk. 548. S. C. [Comb. 200. 4 Mod. 182.] *Elliot* and *Sugden v. Gurr*, 2 Phill. 16. The reason why the Spiritual Court cannot give sentence to annul a marriage after the death of the parties is said to be, because the sentence is given only *pro salute anime*; and then it is too late, *Pride v. Earls of Bath and Montague*, 1 Salk. 120. Although the Ecclesiastical Court cannot pronounce sentence of nullity after the death of one of the married parties, yet it may punish the survivor for the offence, *Brownsword v. Edwards*, 2 Ves. 245. *Hemming v. Price*, 12 Mod. 432.

In the temporal Courts there is a difference

between voidable marriages and marriages void *ab initio*: the former are esteemed valid to all civil purposes, unless sentence of nullity is actually declared during the lifetime of the parties; and, consequently, after the death of one of the parties, the issue cannot be bastardized; but the latter is a meretricious and not a matrimonial union: no sentence of avoidance is necessary; and the issue may be bastardized after the death of one or both the parties, by proving that the supposed marriage was void *ab initio*. *Philips v. Bury*, Skinn. 470. *Pride v. Earl of Bath*, and *Montagu Elliot* and *Sugden v. Gurr*, *ub. sup.* and *Fide Haydon v. Gould*, 1 Salk. 119. Co. Litt. 244 a.

"have like trial and advantage, as in other cases of traverse." By which it appears that the party grieved shall have a traverse (without speaking of any office), and proceed and have such advantage as in other cases of traverse: and in other cases of traverse there needs not any office. But it was resolved, that as this case at bar is, the plaintiff ought to have an office found before he can traverse. And as to the first objection it was answered, and resolved that in such special case of finding an heir, he who is right heir and grieved by the office shall have a new writ of *Diem clausit extremum*, or *Mandamus*. For he is a stranger to the said office, and therefore the office shall not conclude him. And the said rule, and the books are to be intended, that the same person shall not have a new *Diem clausit extremum*, or *Mandamus*, after an office once duly found; but another person shall have one in that case to prove himself heir, and therewith agree 30 Ass. p. 28. F. N. B. 261, 262. 4 H. 7. 15 b. 12 R. 2. Livery 28. Stamf. Prærog. 52 b. And that there ought to be an office before he can traverse, the common law therein hath great reason; for when the King is sure of wardship or *primer seisin* by the office, it is not reason that any one who pretends himself heir should traverse the first office that the other is not heir, until the King be sure to have profit by him, either by wardship or *primer seisin*; for then, after the first office avoided by traverse, he might shew matter to bar the King of wardship and *primer seisin*, which would not be reasonable. Also at the common law interpleader lies, where by two several offices in one and the same county several persons are severally found heirs to one and the same person, to one and the same land; *ergo*, the party grieved may have a writ to find an office for him; for otherwise no interpleader can be: for the heir who was first found heir shall have a *scire facias* in the Chancery against him who is found heir by the second office (because the King is in doubt to whom to make livery); upon which if he appear, and justify the second office, for the trial of the privy of the blood, then he ought to traverse the first office (for all the interpleading shall be thereupon), and upon the trial thereof he who is found heir shall have livery. So that it clearly appears that he who traverses the office in such case ought to have an office found for him by the common law: and therewith agree 36 E. 3. Travers. 44. 16 E. 4. 4. Fitz. Nat. Br. 162, 262. For he who ought to sue *livery, ought to have an office before he traverses. Otherwise of a stranger who destroys the King's title. *Vide* 36 E. 3. Traverse 44. 12 E. 4. 18 b. 16 E. 4. 4 a. 43 Ass. 20. 9 H. 7. 24. 5 E. 4. 5. 12 H. 6. 46 E. 3. Bre. 618. As to the second objection, it was answered and resolved, that the said act of 2 E. 6. gives not a traverse to him who pretends himself to be heir against an office finding for another heir, without an office found for him; for that is incident to it, which is not taken away by the general words of the act; for then all interpleaders would be thereby also taken away, which never was the intention of the act: but the intention of the makers of the act was, to take

The plaintiff ought to have an office found before he can traverse. He who is right heir, and grieved by the office, shall have a new writ of *diem clausit extremum*, or *Mandamus*.

Jenk. Cent. 289. Cro. Jac. 186. Co. Lit. 77 b. 2 Inst. 690.

At common law interpleader lies where by two several offices in one and the same county several persons are severally found heirs.

[* 45 b.]

away a great doubt that was at the common law, if one be found heir within age by one office, and afterwards another is found heir in the same county of full age, if any traverse and interpleader should be immediately, or if the traverse and interpleading should stay until the full age of the infant, *suit vexata questio*, as appears in our books, *scil.* 36 E. 3. Traverse 44. 5 E. 4. 4. 1 H. 7. 14 a. F. N. B. 162. And therefore to oust that doubt was the stat of (a) 2 E. 6. made, by which it is enacted, "that the party grieved shall have a traverse immediately," which word (immediately) proves the intention of the said act to provide for the said doubt, and to give him who was grieved in such case a traverse presently; but not to alter the foundation of the traverse, *sc.* office, which ought to be found for the party grieved before he could traverse: and where the statute saith that he shall have a traverse presently, it is intended that he ought to observe all (b) incidents to a traverse: for the office is the ground and foundation of his traverse. As to the third point it was resolved by the greater part, that a bill of revivor on a bill of revivor should not be admitted (F) for the infiniteness: for (c) *infinitum in jure reprobatur*; and no writ of *journeys accompts* on *journeys accompts* shall be brought. But it was resolved by all, that, as this case is, the last bill of revivor was absurd, for it prays that the first bill might be revived; and the first bill prays, that Martha might traverse, and Martha is dead; and therefore the bill of revivor ought to have prayed that her heir might traverse. And so first the divorce, so long as it doth remain in force, doth bind the right. 2. The not finding of an office doth disable the plaintiff to traverse the office: and, lastly, the bill of revivor on the bill of revivor, as this case is, is not maintainable.

(a) 2 E. 6. c. 8.
2 Inst. 688,
689, &c.

(b) 2 Inst. 690.
There cannot
be a bill of re-
vision upon a
bill of revivor.
(c) 6 Co. 45 a.
9 Co. 168 b.
12 Co. 24.
2 Inst. 340.
Hob. 159.

(F) According to the present practice of the first bill. *Vid. Attorney-General v. Barkham*, Hard. 201.
the Chancery Courts there may be a bill of revivor on a bill of revivor to revive the

FINIS.

THE
EIGHTH PART
OF THE
REPORTS

OF
SIR EDWARD COKE, KNT.

LORD CHIEF JUSTICE OF THE COMMON PLEAS.

OF DIVERS RESOLUTIONS AND JUDGMENTS GIVEN UPON SOLEMN ARGUMENTS,
AND WITH GREAT DELIBERATION AND CONFERENCE
OF THE MOST REVEREND JUDGES AND SAGES OF THE LAW, OF CASES IN LAW
WHICH WERE NEVER RESOLVED OR ADJUDGED BEFORE:
AND THE REASONS AND CAUSES OF THE SAID RESOLUTIONS AND JUDGMENTS.

PUBLISHED IN

THE NINTH YEAR OF THE MOST HIGH AND MOST ILLUSTRIOUS

JAMES,

KING OF ENGLAND, FRANCE, AND IRELAND, AND OF SCOTLAND THE XLIV.

THE FOUNTAIN OF ALL PIETY AND JUSTICE, AND THE LIFE OF THE LAW.

Nulli vendemus, nulli negabimus, aut differemus justitiam aut rectum.

Magna Charta, cap. 29.

Rex præcepit ut pax sacrosanctæ ecclesiæ et regni solide conservetur et colatur in omnibus, et
quod justitia singulis, tam pauperibus quam divitibus, administretur, nulla habita personarum
ratione.

Westmonast. l. . 1.

WITH NOTES AND REFERENCES,

By JOHN FARQUHAR FRASER, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

DEO, PATRIÆ, TIBI.

QUOD scripsi (ut noverit lector eruditus) priorum mearum in nonnullis Prefationum de legum Angliæ, et antiquitate et excellentia, duas has produxit quæstiones: 1. An historiographi in hoc mihi conveniunt quod in illis adeo confidenter asserui: 2. Cum tam crebra facta sit de legibus Angliæ municipalibus repetitio, quodnam sit corpus sive textus juris municipalis et ubi deinde inveniendum. Ad utrasque quarum responsion' tandem reddere visum est. Primam quod attinet, quanquam libri et acta publica (quæ sunt et vetustatis et veritatis vestigia) a me in prefationibus in tertiam et in sextam Commentariorum meorum partem prolata, ejus fidei sunt et autoritatis quod historiographi auxilio nequaquam opus est; leviori tamen ut dicam tactu, ex consentiente historiarum suffragio de antiquitate, et

THAT which I have written (as you know learned reader) in some of my former Prefaces of the antiquity and excellency of our laws of England, hath produced these two questions: first, Whether historiographers do concur with that which there so constantly hath been affirmed? Secondly, seeing so great and so often rehearsal is made of the common laws of England, what the body or text of the common law is, and consequently where a man may find it? To both which in the end I yielded to make answer. For the first: albeit the books and records (which are *et vetustatis et veritatis vestigia*) cited by me in the prefaces to the Third and Sixth Parts of my Commentaries, are of that authority that they need not the aid of any historian: yet will I with a light touch set down out of the consent

Mr. Amos's
note, p. 52.
Fortescue De
Laudibus.
Hale's Hist.
C. L. 58. Miller,
State of the
Civil Law, 232.

Ex vita Abbatis
Sancti Albani.

Ex lib. Monast.
de Litchfield.

of history, some proofs of the antiquity, (and from the censure of those persons, who in respect of their profession (for they were monks and clergymen) may rather be suspected of reservedness than flattery) somewhat of the equity and excellency of our laws; and that it doth appear most plain by successive authority in history what I have positively affirmed out of record, that the grounds of our common laws at this day were beyond the memory or register of any beginning, and the same which the Norman conqueror then found within this realm of England. The laws that William the Conqueror swore to observe, were *bonæ et approbatæ antiquæ regni leges*, that is, the laws of this kingdom were in the beginning of the Conqueror's reign good, approved, and ancient. And, that the people might the better observe their duty, and the Conqueror his oath, he caused twelve of the most discreet and wise men in every shire throughout all England, to be sworn before himself, that, without swerving, either *ad dextr'* or *sinistram*, that is, neither to flatter prerogative, or extend privilege, they should declare the integrity of their laws without concealing,

(*censura eor'*, quos forsant non immerito (si spectes eorum ordinem) suspiceris potius de vitio reticendi quam blandiendi) de æquitate et excellentiâ legum nostrar', nonnulla adjiciam argumenta; et quod testimoniis historiæ omnium superior' tempor' liquet hoc imprimis manifesto, quod positive ex monumentis affirmavi, principia nempe legum nostrar' hodie municipalium tanto ævo inluisse, quod nihil omnino illorum de origine ostendi potest; hæcque illa fuisse eadem quæ victor ille Normannus in hoc Angl' regno inveniebat. Leges, quas Gulielmus gentis nostr' subactor jurejurando se astrinxit observaturum, fuerunt bonæ et approbatæ antiquæ regni leges. Et, quo rectius populus sua officia et victor jurament' sanctius observarent, constituit, ut de singulis totius Angl' comitatibus 12, viri sapientiores coram se jurerent, quod nec ad dextram nec ad sinistr' declinantes, hoc est, nec prærogativam blandientes, nec privilegia dilatantes, legum suarum sanctitatem patefacerent, nil prætermittentes, nil addentes, nil prævaricando mittentes: Et Aldredus Archiepisc' (qui corona Regis caput cinxit triumphali) et Hugo Londinensis Episcop', per præcept' Regis

scripserunt propriis manibus omnia quæ præd' jurati dixerunt. Et has (teste Ingulpho) authenticas esse et perpetuas per totum regnum Angl' inviolabiliter tenendas sub pœnis gravissimis proclamavit. Summam cujus, cum digessisset in Magn' (ut loquimur) Chartam, solum proculdubio et fundament' leg' omnium posterior' signaculo securitatis et voto beavit æternitatis, hoc generali concludens edicto: hoc quoque præcipimus, ut omnes habent et teneant legem Edwardi Regis in omnibus rebus: benignique sui operis prælustri hac sua inscrip' erexit frontispicium: *Willielmus Dei gratia Rex Anglorum, Dux Normannor', omnib' hominib' suis Francis et Anglicis salutem. Statuimus imprimis super omnia unum Deum per totum regn' nostr' venerari, unam fidem Christi semper inviolatam custodiri, pacem et concordiam, judicium et justiciam inter Anglos et Normannos, Francos et Britones Walliæ et Cornubiæ, Pictos et Scotos Albanæ, similiter inter et insulanos, provincias et patrias, quæ pertinent ad coronam et dignitatem defensionem et observationem et honorem regni nostri, et inter omnes nobis subjectos per universam monarchiam regni Britannæ*

adding, or in any sort varying from the truth. And Aldred, the Archbishop that had crowned him, and Hugh, the Bishop of London, by the King's commandment wrote that which the said jurats had delivered: and these, (as saith Ingulphus) by public proclamation, he declared to be authentic, and, for ever, under grievous punishment, to be inviolably observed, the sum of which, composed by him into a Magna Charta, (the groundwork of all those that after followed) he blessed with the seal of security, and wish of eternity, closing it up with this general edict: and we further command that all men keep and observe duly the laws of K. Edward: rearing up the frontispiece of his gracious work with his glorious stile "*Willie'mus, Dei gratia Rex Anglorum, Dux Normannor' omnibus hominibus suis Francis et Anglicis salutem. Statuimus imprimis super omnia unum Deum per totum regn' nostr' venerari, unam fidem Christi semper inviolatam custodiri, pacem et securitatem et concordiam judicium et justitiam inter Anglos et Normannos Francos et Britones Walliæ et Cornubiæ, Pictos et Scotos Albanæ, similiter inter et insulanos, provincias et patrias quæ pertinent ad*

Ex Ingulpho
Abbate Crow-
landense.
Ex libro Anti-
quarum legum.

Ex libro manu-
scripto de legi-
bus antiquis.

Ex Mat. Par.
monacho Sancti
Albani.

Ex Rogero
Hoveden, Pres-
bytero.

Ex Mat. Par.

Ex Roger Ho-
veden.

coronam et dignitatem, defensionem et observationem et honorem regni nost', et inter omnes nobis subjectos per universam monarchiam regni Britanniae firmiter et inviolabiliter observari."

W. Rufus that succeeded his father, so exceeded himself in misrule and oppression, that there is left no register of his goodness in this kind; for in his time the kingdom was oppressed with unjust exactions, and justice itself corrupted with evil usages, as appeareth by the great Charter of his succeeding brother King Henry I. who thereby took away all the evil customs wherewith the kingdom of England was unjustly oppressed, and restored the law of King Edward, (such law as was in the time of the holy Confessor) with those amendments which his father added by the advice of his Barons. What these were Mat. Par. (who hath inserted the charter in his story) declareth to be the ancient liberties and customs which flourished in this kingdom in the time of holy king Edward. And herewith agreeth Hoveden in these words: King Henry I. took away all the evil customs and unjust exactions wherewith the kingdom of England was unjustly oppressed: he settled an assured peace

firmiter et inviolabiliter observari. Patri qui successit Gulielmus Rufus, rem male gubernando libertatesque omnes supprimendo ita se excessit, quod virtutis suae hujusmodi ne reliquum omnino est vestigium; sub illo enim, regnum oppressum erat injustis exactionibus, justiciaque ipsa malis adulterabatur consuetudinibus, ut plane constat ex Magna illa Charta succedentis sui fratris Henrici primi, qua penitus abrogavit omnes malas consuetudines quib' regn' Angl' injuste opprimebatur, restauravit legem regis Edwardi, (hanc nimirum, quae sancti illius Confessoris viginisset temporibus) cum illis emendationib' quib' pater eam emendavit cum consilio Baronum suorum. Leges hæc a Mat. Par. (cujus historia hanc habet insertam donationem) edocentur fore, Libertates et Consuetudines antiquæ, quæ floruerunt in regno tempore Sancti Regis Edwardi. Hoc etiam testatur Hoveden, in hæc verba; Rex Henricus primus omnes malas consuetudines et iniquas exactiones, quibus regnum Angl' injuste opprimebatur, abstulit, pacem firmam in toto regno suo potuit, et teneri præcepit legem Reg. Edwardi, omnibus in commune reddidit, &c. Quod etiam Florenti-

us Monachus Wigorn' (qui vixit sub Henrico primo) in iisdem fere verbis demonstrat. Quin et, iniusticia seculi superioris unde exorta fuit, et unde et quomodo emendata Gulielmus Monachus Malmesburiensis his meminit verbis. Henricus nat' in Anglia et regie nat', &c. edicto statim per Angliam misso, iniustitias a fratre et Ranulpho institutas prohibuit, &c. aliquarum moderation' legum revocavit insolitam, sacramento suo et omnium procerum ne luderentur corroborans, &c. Rex Steph', qui in avunculi successit regnum, charta sua magna libertatum, Baronibus et hominibus de Anglia, confirmavit his verbis, omnes libertates et bonas leges quas Henricus Rex Angliæ avunculus meus eis dedit et concessit, et omnes bonas leges et bonas consuetudines eis concedo quas habuerunt tempore Reg. Edwardi: curaque illi tanta imprimis fuit innovationi viam intercludendi, quod Rogerus Bacon frater ille perquam cruditus, in libro suo De Impedimentis Sapientiæ, dicit; Rex quidem Stephanus, allatis legibus Italiæ in Angliam, publico edicto prohibuit ne ab aliquo detinerentur. Huic successionem proximus fuit Henricus secundus, qui alia Magna Charta priores

in his whole kingdom, and commanded the law of K. Edward to be observed, he restored to all, &c. The which, almost in the same phrase, Florentius, a Monk of Worcester, and living in the reign of Henry I., also observeth. And by whom the injustice of the foregoing age proceeded, and by whom and how redressed, William the Monk of Malmesbury delivereth in these words: Henry born in England, of kingly birth, &c. by his proclamation speedily sent through England: restrained the injustice brought in by his brother, and Ranulph, &c. and abolished the unwonted lenity of some laws, giving assurance by his own and all the nobility's oath, that they should not be deluded, &c. King Stephen that succeeded his uncle, confirmeth in his Great Charter of Liberties to the Barons and Commons of England in these words, all the liberties and good laws which Henry King of England my uncle granted unto them: and I grant them all the good laws and good customs which they enjoyed in the reign of King Edward, and was so jealous of innovation, as Roger Bacon the learned Friar saith in his

Ex Florentio
Monacho Wi-
gorn.

Ex Willielmo
Monacho
Malmesbury.

Ex libro legum
antiquarum.

Ex libro Rogeri
Bacon De Im-
pediment' Sa-
pientiæ.

Ex libro legum
Antiquarum.

book, *De Impedimentis Sapientiae*: King Stephen forbade by public edict, that no man should retain the laws of Italy formerly brought into England. The next that succeeded was Henry II., who in another Great Charter established the former laws in these words. Henry, by the grace of God, King of England, Duke of Normandy and Aquitain, E. of Anjou, to all Earls, Barons, and his faithful subjects of France and England, greeting: know ye that I, to the honour of God and holy church, and for the common amendment of my whole kingdom, have granted and restored, and by my charter confirmed to God and holy church, and to all Earls and Barons, and to all my subjects, all grants and donations, and liberties and free customs, which King Henry my grandfather gave and granted unto them. And all those evil customs which he abolished and remitted, I likewise do remit, and for me and my heirs do agree shall be abolished. By which words it appeareth, that he had reference to that charter of his grandfather that abolished the unjust exaction and usages of his brother's reign, and confirmed the

stabilivit leges, in hæc verba; Henricus Dei gratia Rex Angl', Dux Normanniæ et Aquitaniæ, Comes Andegaviæ, omnibus Comitibus, Baronibus, et fidelibus suis Francis et Angl' salutem. Sciatis me, ad honorem Dei et sanctæ ecclesiæ, et pro communi emendatione totius regni mei concessisse et reddidisse, et charta mea confirmasse ad honorem Dei et sanctæ ecclesiæ, et omnibus Comit' et Baron' et omnib' hominib' meis omnes concessionem et donationes, et libertates et liberas consuetudines quas Rex Henr' avus meus eis dedit et concessit. Similiter etiam omnes malas consuetudines quas ipse delevit et remisit, ego remitto et deleri concedo pro me et hæredibus meis. Unde liquet eum in chartam avi sui fore relaturum, quâ iniquas exactiones et consuetudines a regnante fratre institutas abolevisset et antiquiores præstantioresque Sancti Ed. leges corroborasset. Nec minus antiquæ pari etiam testimonio constabunt nonnullæ civitatum nostrarum consuetudines: de Londino enim ait Fit-Stephen Monachus Cantuariensis: prius condita est quam illa a Remo et Romulo, (Romam intelligens) unde et adhuc antiquis eisdem utuntur legibus communibus institutis,

&c. Paulo inferius perveniamus usque ad tempora Regis Johannis filii Regis Henrici secundi. Hic anno decimo septimo a suscepto gubernaculo, duas illas constituit magnas chartas, unam, quam decimus, magnam Chartam (ob rei potius momentum quam ob quantitatem) aliam vero Chartam de Forestâ, quæ in hodiernum usque extant diem: de quibus Monachus Sancti Albani: quæ ex parte maxima leges antiquas et regni consuetudines continebant. Et non multo post inquit: capitula quoque legum et libertatum, quæ ibi magnates confirmare querebant, partem in charta Regis Henrici superius scripta sunt, partimque legibus Regis Edwardi antiquis excerpta: non equidem quod has instituisse putes Regem Edwardum, sed quod ex immensa legum congerie, &c. optima quæque selegit, ac in unam coegit; ut in Tertie Partis Relationum mearum Præfatione copiosè magis videri est. Quas quidem Magnas Chartas Regis Johannis in hæc verba habet Mat. Par. p. 246. et eædem plane sunt cum Mag' illâ Chartâ et Chartâ de Foresta, quæ stabiliuntur firmæque redduntur in Magna Charta, anno nono Henrici tertii sancita: quarum tanta est excellentia, quod

old and excellent laws under St. Edward's government. And no less ancient, even by the like authorities will appear the customs of some of our cities: for of London.* saith Fitz-Stephen (a Monk of Canterbury), it was built before that of Remus and Romulus (meaning Rome), wherefore even to this day they use the same ancient laws, public ordinances, &c. Let us descend a little lower to the times of King John, the son of Henry the second, in the 17th year of his reign, made the two great charters, the one called Mag. Char. (not in respect of the quantity, but of the weight) and the other Charta de Foresta, which are yet extant to this day. Of which the Monk of St. Alban's saith, Quæ ex parte maximâ leges antiquas et regni consuetudines continebant: that is, which for the most part did contain the ancient laws and customs of this realm. And soon after he saith: and those laws and liberties which the nobility of the realm did there seek to confirm, are partly in the abovesaid charter of King Henry, and partly taken out of the ancient laws of King Edward: not that King Edward the Confessor did institute them, but that he out of the

Ex Stephanide Monacho Cant' * See the charter of K. W. I. in the Preface to Privilegia Londini.

Mat. Par. ann. dom. 1215. p. 246, 247.

Mat. Par. page
246. Mag.
Cuar. 9 H. 3.

* See the Preface to 2 Instit.

huge heap of the laws, &c. chose the best, and reduced them into one, as in the Preface to the Third Part of my Reports more at large it appeareth. The said Great Charters made by King John are set down in hæc verba in Mat. Par. pag. 246. and in effect do agree with Magna Charta and Charta de Foresta established and confirmed by the Great Charter made in 9 Hen. 3. which for their excellency have since that time been confirmed and commanded to be put in execution by the wisdom and authority of thirty several Parliaments*, and above. And these laws are in the register in many writs called liberties, for there it is said, according to the tenor of the Great Charter of the Liberties of England, so called of the effect, because they make free: and Mat. of Par. and others (as it appeareth before) styleth them by the same name. So as the antiquity and excellency of our common laws do not only appear by historians of our own persuasion in religion, but by these monastical writers: the which I have added the more at large in this point to that which I affirmed in my former prefaces, to the end that they agreeing together, may the better per-

diversorum exinde Parliamentor' prudentia et auctoritas ultra trigesies illas approbaverunt et executioni mandaverunt. In Registro præterea, leges istæ in rescriptis quam plurimis dicuntur libertates; ubi dicitur, juxta tenorem Mag. Char. de Libertatibus Angliæ, ab effectu, quia liberos faciunt: Quas Mat. Par. et alii (ut patet supra) sub eodem habent nomine. Jam tandem, non solum ex historiographis, quibus idem ac nobis in religione suadetur, sed ex hisce etiam monasticis, legum nostrarum municipalium excellentia et antiquas eluceant perspicue. Hoc illi meis in prioribus præfationibus assertioni fusius subtexui, ut earum unita vis facilius utrinque adimat opinionum discrepantiam de veritate clarissimis adeo multis firmissimisque argument' (in suprad' tertiæ partis præmio, immo et testimonio Johannis Fortescue, militis aurati (qui, regnante Henrico sexto, e supremo Angliæ tribunali jus dixit) inter alia prolato in præfatione sextæ mearum relationum partis) demonstrata. Quæ omnia evincunt manifesto leg' municipalium corpus ante devictam hanc nation' inscript' non fuisse in fragmentis illis edictorum atque constitutionum pro-

mulgatis sub titulo legum Regis Alvredi, Edwardi primi, Edwardi secundi, Ethelstani, Edmundi, Edgari, Ethelredi, Canuti, Edwardi Confessoris, aliorumve regum Angliæ; gente hac nondum subjugata: quin et, illa adhuc reliquia legum perpauca capitula, majore ex parte sunt edicta quædam et constitutiones, ab iisdem regibus, ex assensu comitiorum regni, separatim sancita.

2^o De præstantia legum nostrarum communium, hoc adjiciam, quod Monachus Crowlandensis illas nequaquam immerito appellavit leges æquissimas. Et de illis ait Matth. Westmonasteriensis: jubente Cnutone ab Anglica lingua in Latinam translatae, tam in Dacia quam in Anglia propter eorum æquitatem

suade both parties to agree to the truth manifestly proved by many unanswerable arguments in the said Preface to the Third Part; and also by the authority of Sir John Fortescue, Ch. Justice in the reign of King Hen. 6. amongst others at large, cited in my Preface to the Sixth Part: by all which it is manifest, that in effect, the very body of the common laws before the Conquest are omitted out of the fragments of such acts and ordinances as are published under the title of the Laws of King Alfred, Edward the First, Edward the Second, Ethelstane, Edward, Edgar, Etheldred, Canutus, Edward the Confessor, or of other Kings of England before the Conquest. And those few chapters of laws yet remaining, are for the most part certain acts and ordinances established by the said several Kings by assent of the Common Council of their kingdom.

2dly. As for the excellency of our municipal laws, I will add to that which hath been said before, that the Monk of Crowland calleth them the most just laws, and Mat. of Westm. of them saith, they being by the appointment of King Cnute translated out of English into Latin, were by him, for

Ex Monacho
Crowlandiæ.
Ex Mat. West.

their equity, commanded to be observed, as well in Denmark as in England. And of this matter thus much shall suffice.

But yet before I take my leave of these historians, I must encounter some of them in two main points.

Trials by jury appear to have been in use among the old Britons. See LL. Hoeli.

First, that the trial by juries of twelve men (which is one of the invincible arguments of the antiquity of the common laws, being only appropriated to them,) was not instituted by the powerful will of a conqueror, as some of them peremptorily affirm they were.

The 2d, that the Court of Common Pleas was not erected after the statute of Magna Charta (which was made in the ninth year of King Hen. 3.) contrary to that which others do hold. For the first, I refer the learned reader to the Preface before the Third Part of my Reports, where he shall receive full and clear satisfaction herein, and will only add the judgment of the great ornament (in his kind) of this kingdom in his Britannia, p. 109. with which I will conclude this point: "But whereas Polidore Virgil writeth, that William the Conqueror first brought in the trial by 12 men, there is nothing more untrue, for it is most certain and apparent by the

a rege præfato observari jubentur. Atque de hac re hæc sufficient.

Missos tandem faciamus historicos, si in duobus magni ponderis et momenti illis prius occurramus.

Primo, morem experiundi causas per duodecim viros juratos (qui firmisimorum unum est argumentor' antiquitatis legum communium, ut his solis proprius) potentis subjigatoris ex arbitrio non fuisse introductum ut eorum nonnulli audacter satis affirmarunt.

Secundo, curiam actionum communium institutam non fuisse post statutum Magnæ Chartæ (anno nono Henrici tertii sancitum) hoc quod opinioni quorundam aliorum penitus adversatur. Ad primum quod attinet, consulat lector doctus præmium in Tertiam Relationum mearum partem, ubi habeat in quo hac de re edoctus satis acquiescat: interea tamen magni illius (suo genere) hujus regni ornamenti attexam sententiam in elaborata ejus Britannia, pag. 109. quæ clausam habes hanc rem. Quod vero Polidorus Virgilius scribit, Gulielm' illum Victorem duodecim virorum judicium primum induxisse, nihil a vero alie-

Cam. Brit. p. 109.

nus ; multis enim ante annis in usu fuisse certissimum est ex legibus Etheldredi : nec est cur terribile iudicium vocaret, e populo enim duodecim viri liberi et legales e vicinia rite evocantur ; hi jurejurando obligantur vere de facto sententiam dicere ; advocatos coram tribunali utrinque disserentes, et testes audiunt ; inde, receptis utriusque partis instrumentis, concluduntur, sine cibo, potu, et igne detinentur, (nisi forte periculum sit ne ex illis quispiam moriatur) donec de facto inter se convenerint, quod ubi coram iudice pronunciaverint, ille de jure sententiam profert. Hanc enim rationem prudentissimi majores nostri optimam esse ad veritatem eliciendam, tum ad corruptelas evitandas, et affectus intercludendos existimarunt." Et modus hic eruendi veritatem (præstantissimus omnino, planeque æquissimus) qua de causa juri municipali Angliæ peculiaris est, discas evoluendo hæc quæ scripsit Justiciarius Fortescue, cap. 25, 26, 27, 28, 29, 30, 31, 32, &c. Quæ cum, ut literis effingerentur aureis, optime promeruerunt (si vel gravitatem vel excellentiam spectemus) nullam inde partem a me habes abstractam, propterea quod

laws of King Etheldred that it was in use many years before : neither hath he any cause to term it a terrible judgment ; for free-born and lawful men, are duly by order impanelled and called forth of the neighbourhood, these are bound by oath to pronounce and deliver up their verdict touching the fact ; they hear the counsel plead on both sides before the bench or tribunal, and the depositions of witnesses ; then taking with them the evidences of both parties, they are shut up together, and kept from meat, drink, and fire, (unless peradventure some one of them be in danger of death) until they be agreed of the matter in fact : which when they have pronounced before the Judge, he according to law giveth sentence. For this manner of trial our most wise and provident ancestors thought the best to find out the truth, to avoid corruption, and to cut off all partiality and affections." And for the excellency and indifferency of this kind of trial, and why it is only appropriated to the common laws of England, read Justice Fortescue, ca. 25, 26, 27, 28, 29, 30, 31, 32, &c., which being worthy to be written in letters of gold for the

Fortescue. See also Sir M. Hale's Hist. of the law, cap. 13.

weight and worthiness thereof, I will not abridge any part of the same, but refer the learned reader to the fountain itself.

As to the second, it is clearer than the light at noon day, that the Court of Common Pleas was not erected after the statute of 9 H. 3. cap. 11. Common Pleas shall not follow our Court, but shall be holden in some place certain. First, at the same time, and in the same great charter, and in the next Chapter saving one, the Court of Common Pleas is expressly named, assises of darrien presentment shall always be taken before the Justices of the Bench, and no man doubted but Justiciarii de Banco are Justices of the Common Pleas. 2. King Henry the First, the son of the Conqueror, by his charter, granted to the Abbot of B. a charter of confirmation of all his usages, &c. And farther granted, that he should have conusance of all manner of pleas, so that the Justice of the one Bench, or of the other, or Justices of Assise, should not meddle, &c. and this charter appeareth in 26 lib. Ass. pl. 24. 3. In the book-case of 6 Ed. 3. fol. 54, 55, it appeareth that 15 Mich. in the sixth year

fontes ipsos petat velim lector eruditus.

Secundo loco, luce ipsa meridiana apparet clarius curiam communium placitorum originem neutiquam habuisse post statutum, 9 Hen. 3. cap. 11. communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo. Primo eodem ipso tempore, eademque charta, capite decimo tertio, curia actionum communium expressim nominatur: assisæ de ultima præsentatione semper capiantur coram Justiciariis de Banco, et ibi terminentur: et dubium nemini est quin Justiciarii de Banco sint Communium action' Justiciarii, secundo, Rex Henricus Primus, filius victoris, chartam Abbati de B. fecit confirmation' omnium suarum consuetudinum, etc. et ulterius ei concessit cognitionem actionum omnium quarumcunque, adeo ut neutrius Banci, sive assisar', Justiciariis liceret interponere autoritatem suam: et hoc perspicuum est ex 26 Ass. pl. 24. tertio, in 6 E. 3. fol. 54, 55. constat, 15 Michaelis anno sexto regis Richardi Primi, finem fuisse levatum (ut loquimur) inter Abbatem de S. et Theoband C.

26 lib. Ass. pl.
24. 6 E. 3. 54,
55. 15 Mich.
6 Ri. Primi.

de jure patronatus ecclesiæ de Preston, coram Archiep' Cantuariensi, episcop' Rossensi; et aliis Justiciariis de banco, id est, de curia placitorum sive action' communium. Quin et in commentar' magist' Plowden in casu Stowell, fines fuisse levatos, nondum hoc regno subjugato, manifestum est. In archivo, etiamnum hodie extant fragmenta nonnulla actuum publicorum atq. judiciorum sub rege Richardo Primo, tam coram Justiciariis de Banco, quam coram Rege. Martinus de Pateshull constitutus erat Justiciarius de Banco, anno primo regis H. Tertii, nondum adhuc edito statuto Magnæ Chartæ. Et in anno decimo Edwardi Quarti, f. 53. omnes totius Angliæ Judices, Cancellariam, Bancum Regium, Bancum Communem, et scaccarium, esse Regis foræ affirmabunt, sicque ex omni ætatum memoria extitisse; adeo ut dicitur nemo sciat, hoc est eorum antiquissimum. In hac vero perspicua veritate hæc nobis sufficiant. Hic tamen observem Episcopos olim quam plurimos, aliosq. viros ecclesiasticos, studio legum municipalium Angl' cupide invigilasse, plenamque inde uberiores adeptos fuisse cognitionem: idem enim Martinus de Pa-

of King Richard the First, a fine was levied between the abbot of S. and Theoband C. of the advowson of the church of Preston, before the Archbishop of Canterbury, the bishop of Rochester, and others, (Justices del Banke, that is, of the Court of Common Pleas.) And it appeareth in Master Plowden's Commentaries in Stowel's case, that fines were levied before the Conquest. In the treasury there are yet remaining some fragments of records and judgments in the reign of King Richard the First, as well coram Justiciariis de Banco as coram Rege. Martin de Pateshull was made Justiciarius de Banco, in the first year of Hen. 3. which was before the statute of Magna Charta. And in anno 10 Ed. 4. fol. 53. all the Judges of England did affirm that the Chancery, King's Bench, Common Pleas, and Exchequer, be all the King's Courts, and have been time out of memory of man; so as no man knoweth which of them is the most ancient. But in a case so clear this shall suffice. And yet let me observe, that divers bishops and other ecclesiastical persons in ancient time, did studiously read over the laws of England, and there-

Pl. Com. in
Stowel's case.

Ex. rot. Pat. de
anno 1 H. 3.
10 E. 4. f. 53.

Joh. Britton,
Episcopus
Heref.

Mat. Par. p.
350.

by attained to great and perfect knowledge of the same. And the said Martin de Pateshull, who was, as before is said, Chief Justice of the Court of Common Pleas in the first year of King Henry the Third, was also Dean of St. Paul's, of whom it is said that he was a man of great wisdom, and exceeding well learned in the laws of this land. And John Britton, Bishop of Hereford, wrote an excellent work in the days of King Edward the First, of the common laws of England, which remains to this day. And many noblemen have been excellently learned in the laws of England as taking one example for many, lest this Preface should grow too large. Ranulphus de Meschines, the great and worthy Earl of Chester, and the third and last of that family, (having as mine author saith) great knowledge and understanding in the laws of this land, compiled a book of the same laws, as a witness of his great skill therein : of whom Mat. Par. p. 350. reporteth (as an effect of his learning and knowledge in the laws of this realm :) but Ranulph Earl of Chester alone valiantly resisted, as not willing to bring his country into servitude (by

teshull capitalis de Banco. Justiciarius anno primo Regis Henrici tertii (ut supra memoratur) decanus item fuit ecclesiæ Sancti Pauli : de quo dicitur ; vir fuit summæ prudentiæ, et in legibus hujus regni peritissimus. Et Johannes Britton Episcopus Herefordensis, optime sub Rege Edwardo I. scripsit de municipalibus Angliæ legibus cujus hodie habemus opera. Multi etiam magnatum, in legibus Angl' periti imprimis evaserunt, utputa (quod unum instar multor' habeas, ne hæc egrediatu'r suos fines præfatio.) Ranulphus de Meschines, clarus ille et illustis comes Cestriæ, ejusque familiæ tertius et postremus (vir nisi, me meus fallat author, summa scientia et peritia hujus regni legum singulari) de eisdem librum composuit, qui suam in illis cognition' abunde satis testatur : de quo M. Par. p. 350. meminit (effect' ejus doctrinæ legumque hujus reg' prudentiæ certissimum :) solus autem comes Cestrensis Ranulphus stetit viriliter, nolens terram suam redigere in servitutem (i. decimasolvere domino Papæ) nec permisit de feodo suo viros religiosos vel cleric' decimas memoratasolvere, quamvis Anglia et Wallia, Scotia et Hibernia, ad solutionem compellarentur.

Et ad Comitum Parliamentum anno Regis Henrici tertii vices imo actus sic se habet: Rogaverunt omnes Episcopi magnates ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium quantum ad successionem hæreditariam, quia ecclesia tales habet pro legitimis; et omnes Comites et barones una voce responderunt, quod noluerunt leges Angliæ mutare quæ hucusque usitatæ sunt et approbatæ. Fixa cujusmodi et uniformis omnium Angliæ magnatum responsio, nullo contradicente, interiorum eorum zelum et reverentiam, quæ medullitus (si dicam) in patriæ suæ charissimæ leges communes haberent, patefecit. Certa quidem et continua tam inde a devicta hac natione in municipalibus Angliæ legibus praxis regnante ipsius victoris filio Henrico primo (cum flagrantis illius subjugationis vix adhuc evanisset) et abinde hucusque deducta, illas ante ingressum victoris Gulielmi in usu fuisse evincit manifeste. Nequaquam enim foret possibile, talem leges attingisse perfectionem sub succedente Henrico secundo, qualem tunc habuissent, si a victore adeo nuperrime introductæ vel institutæ fuissent. De quibus legibus hoc confidenter sta-

paying of tenths to the Pope :) and would not suffer the religious or clerks of his fee to pay the said tenths, although all England and Wales, Scotland and Ireland, were compelled to pay them. And at a Parliament holden in the twentieth year of King Henry the Third, the act saith; all the bishops desired the lords that they would consent, that all such as were born afore matrimony should be legitimate as well as they that be born within matrimony, as to the succession of inheritance, forasmuch as the church accepteth such for legitimate; and all the earls and barons with one voice answered, that they would not change the laws of this realm, which hitherto have been used and approved. Which uniform and resolute answer of all the nobility of England, nullo contradicente, doth shew the inward and affectionate love and reverence they bear unto the common laws of their dear country. The certain and continual practice of the common laws of England, soon after the Conquest, even in the time of King Henry the First, the Conqueror's son, (which almost was within the smoke of that fiery conquest) and

See the stat. of Merton.

continued ever since, do plainly demonstrate that those laws were before the days of William the Conqueror. For it had not been possible to have brought the laws to such a perfection as they were in the reign of King Hen. II. succeeding, if the same had been so suddenly brought in or instituted by the Conqueror: of which laws this I will say, that there is no human law within the circuit of the whole world, by infinite degrees, so apt and profitable for the honourable, peaceable, and prosperous government of this kingdom, as these ancient and excellent laws of England be.

Ranulphus de Glanvilla, Chief Justice in the reign of King Henry the Second, learnedly and profoundly wrote of part of the laws of England (whose works remain extant at this day:) and in his Preface, he writeth, that the King did govern this realm by the laws of this kingdom, and by customs founded upon reason, and of ancient time obtained. By which words spoken so many hundred years since, it appeareth, that then there were laws and customs of this kingdom grounded upon reason, and of ancient time obtained, which he neither

tuam, nullam esse legem (humanam dico) in toto hoc terrarum orbe, qua cum honore, pace et concordia res in hoc regno agantur publicæ, infinitis prorsus gradibus, æque commode atque his antiquissimis ac præstantissimis Angliæ legibus.

Ranulphus de Glanvilla, Justiciarius Capitalis sub Henrico secundo, legum Angliæ partem doctissime pariter atque consultissime literis commendavit (cujus opera in hodiernum usque diem supersunt ejusdemq' tractatus præmio scribit, Regem hanc gentem gubernasse legibus regni et consuetudinibus de ratione introductis et diu obtentis: ex quibus verbis, adeo multis abhinc seculis, emissis, manifestum est, quod tunc fuerunt leges regni et consuetudines ratione fundatæ et antiquis temporibus acquisitæ; quæ proculdubio nec potuit nec asserere

voluit, si adeo recenter et fere immediate ante per expugnatores fuissent institutæ. Et ne reverendissimo illi judici videar ingratus (cujus testimonium hisce meis lucubrationibus (sicut alias sæpe a me habes prolata) pro fructu quem ex pulcherrimis ejus operum arvis me collegisse confiteor, in honorem ejus, et nominis, et sobolis hodie florentis (sicut optima mihi cognoscendi est occasio) in secula futura emittere et in medium proferri visum est, quæ magnæ fore vetustatis et exploratæ veritatis sæpissime sum expertus: quorum origo apud me est, et hisce verbis sequuntur. Ranulphus de Glanvilla Justitiar' Angl', fundator fuit domus de Butteley in comitat' Suffol' quæ fundata erat an. Reg' Henrici filii imperatricis decimo septimo, et an' Dom' 1171, quo an' T. Becket Cantuariensis Archiepisc' erat occisus. Et dictus Ranulph' nascebatur in villa de Stratford in com' Suffol' et habuit manerium de Benhall cum toto dominio ex dono dicti Reg' Henrici: et duxit in uxorem quandam Bertam filiam dom' Theobaldi de Valeymz senioris, dom' de Parham; qui Theobaldus per chartam suam dedit dicto Ranulpho et Bertæ uxori suæ totam terram de Brochous cum pertinent', in

could nor would have affirmed, if they had been so recently and almost presently before that time instituted by the Conqueror. And in token of my thankfulness to that worthy Judge whom I cite many times in these Reports, (as I have done in my former) for the fruit which I confess myself to have reaped out of the fair fields of his labours, I will for the honour of him and of his name and posterity, which remain to this day (as I have good cause to know) impart and publish both to all future and succeeding ages which I have found of great antiquity, and of undoubted verity; the original whereof remaineth with me at this day, and followeth in these words. Ranulphus de Glanvilla Justiciarius Angliæ, fundator fuit domus de Butteley in com' Suff. quæ fundata erat anno Regis H. filii imperatricis 17, et anno Dom. 1171. quo anno Tho. Becket Cantuar' Archiepiscopus erat occisus. Et dictus Ranulphus nascebatur in villa de Stratford in com' Suff. et habuit manerium de Benhall cum toto dominio ex dono dicti Regis H. Et duxit in uxorem quandam Bertam filiam domini Theobaldi de Valeymz senioris, dom' de Parham, qui Theo' per chartam suam dedit dic-

He did bear azure, a chief indented, Or: which coat armour the Pastons of Norfolk do quarter at this day. Justiciarius Angliæ. Fundator prioratus de Butteley.

Donum Reg' Uxor ejus.

Filii ejus.

Nuptiæ et donationes filiarum, et earum posteritas.

to Ran' et Bertæ uxori suæ totam terram de Brochous cum pertin', in qua domus de Butteley sita est, cum aliis terris et tenementis in libero maritagio. Præd' vero Ranulph' procreavit tres filias de dicta Berta, viz. Matildam, Amabiliam, et Helewisam, quibus dedit terram suam ante progressum suum versus terram sanctam. Matilda, prima soror, habuit ex dono patris sui totam villam de Benhall integraliter una cum advocacione ecclesiæ sive monasterii beatæ Mariæ de Butteley, et nupsit cuidam militi nomine Willielmo de Auberville, de quibus processit Hugo de Auberville, de ipso Hugone Will' de Auberville, de ipso Willielmo processit quædam Johanna filia unica et hæres, quæ nupsit cuidam militi de Cancia nomine Nicholao Kyryell qui duxit in uxorem Margaretam filiam dom' Galfridi Peche; et ille Nich' vendidit dom' Guidoni' Ferr' præd' manerium de Benhall: et tum ille Nich. de uxore sua genuit alium dom' Nich' militem in Cancia, qui vixit ante primam pestilentiam. Ipse autem Guido talliavit præd' maner' in cur' dom' Regis apud Westm' in crastino ascensionis Dom', anno regni Regis E. filii E. primo, sibi et Alianoræ uxori suæ et hæredibus de se exeunt':

qua domus de Butteley sita est, cum aliis terris et tenementis in libero maritagio. Prædictus vero Ranulphus procreavit tres filias de dicta Berta, viz. Matildam, Amabiliam, et Helewisam, quib' dedit terram suam ante progressum suum versus terram sanctam. Matilda, prima soror, habuit ex dono patris sui totam villam de Benhall integraliter una cum advocacione ecclesiæ sive monasterii beatæ Mariæ de Butteley, et nupsit cuidam militi nomine Willielmo de Auberville, de quibus processit Hugo de Auberville: de ipso Hugone Willielmus de Auberville, de ipso Willielmo processit quædam Johanna filia unica et hæres, quæ nupsit cuidam militi de Cancia nomine Nicholao Kyryell, qui duxit in uxorem Margaretam filiam dom' Galfridi Peche; et ille Nicholaus vendidit domino Guydoni Ferr' præd' manerium de Benhall: et tum ille Nicholaus de uxore sua genuit alium dominum Nicholaum militem in Cancia, qui vixit ante primam pestilentiam. Ipse autem Guido talliavit præd' maner' in curia dom' Regis apud Westmonastr' in crastino ascensionis Dom', anno regni Regis Edwardi filii Edwardi primo, sibi et Alianoræ uxori suæ, et hæredibus de se exeunt': et si ipse Guido sine hærede discederet, rem'

Willielmo de sancto Quintino et hæredibus. Amabilia, secunda soror, habuit ex dono patris sui medietatem villæ de Bawdesceia, et medietatem villæ de Fynbergh: Amabilia prædicta habuit virum nomine Ranulphum de Ardern, de quo processit Tho. de Ardern filius et hæres, de Thoma Ranulphus filius et hæres, qui feoffavit priorem et conventum de Butteley de medietate villæ de Bawdesey. De prædicto Ranulpho processit quidam Tho. Ardern filius et hæres. Helewisa, tertia soror, habuit ex dono patris sui aliam medietatem villæ de Bawdesey prædictæ, et aliam medietatem villæ de Fynbergh prædicta: Helewisa prædict' habuit virum nomine Robertum filium Roberti, de quo processit Radulphus filius et hæres, qui feoffavit Warinum de insula de medietate prædict' villæ de Fynbergh. De Radulpho processit Robertus filius et hæres, qui feoffavit Ran' fratrem suum de medietate prædictæ villæ de Bawdesey. Et nota quod præfatus Ranulph' de Glanvilla fuit vir præclarissimus genere, utpote de nobile sanguine, vir insuper strenuissimus corpore, qui provectiori ætate ad terram sanctam properavit, et ibidem contra inimicos crucis Christi strenuissime usque ad necem

et si ipse Guido sine hærede discederet, rem' Wil' de S. Quintino et hæredibus. Amabilia, secunda soror, habuit ex dono patris sui medietatem vill' de Bawdesceia et medietat' vill' de Fynbergh. Amabilia præd' habuit virum nomine Radulph' de Ardern, de quo processit Tho. de Ardern filius et hæres, de Tho' Radul' filius et hæres, qui feoffavit priorem et conventum de Butteley de medietate villæ de Bawdesey. De præd' Radulpho processit quidam Tho. Ardern filius et hæres. Helewisa, tertia soror, habuit ex dono patris sui aliam medietat' villæ de Bawdesey præd', et aliam medietatem villæ de Fynbergh præd'. Helewisa prædicta habuit virum nomine Robertum filium Rob. de quo processit Rad' filius et hæres, qui feoffavit Warinum de insula de medietate prædicta villæ de Fynbergh. De Rad' processit Rob. filius et hæres qui feoffavit Ran' fratrem suum de medietate prædict' villæ de Bawdesey. Et nota, quod præfatus Ranulph' de Glanvilla fuit vir præclarissimus genere, utpote de nobili sanguine vir insup' strenuissimus corpore qui provectiori ætate ad terram sanctam properavit, et ibidem contra inimicos crucis Christi strenuissime usque ad necem

Vir præclarissimus et de nobili sanguine.

Vir strenuissimus. Vide Pl. Com. f. 368. b. obiit apud Acres. Ad terram sanctam peregrinatus. Effusio sanguinis contra inimicos Christi. Prosapia uxor Bertæ.

dimicavit. Fuit autem Berta ex illustri prosapia orta, filia dom' Theobaldi Valeymz senioris, dom' de Parham, quorum et Ranulphi et Bertæ consanguinei multi de quibus plures milites, omnes vero gentiles et generosi, istam part' Suff. eor' incolatu et generosa carnis propagine honorifice illustrabant annis multis.

And Hen' de Bracton, a Judge of this realm, in the reign of King Henry the Third, in his first chapter of his first book, *Numero tertio*, saith: I Henry de Bracton have set my mind to search out diligently the ancient judgments of the just, not without much pains and labour, &c. So as he styleth the laws of England, by the name of the ancient judgments of the just. The author of the book called *Fleta* (who wrote in the reign of King Edward the First) in his Preface to his work agreeth with Glanvill concerning the antiquity and honour of the laws of England, and there sheweth the reason wherefore he intituled his book by the name of *Fleta*: but this treatise which may worthily be called *Fleta*, because it was compiled in the Fleet, of the laws of England. I have a register of our writs original, written in the reign of King Henry the Second,

dimicavit. Fuit autem Berta ex illustri prosapia orta, filia dom' Theobaldi Valeymz senioris, dom' de Parham, quorum et Ranulp' et Bertæ consanguinei multi, de quibus plures milites, omnes vero gentiles et generosi, istam partem Suffolciæ eorum incolatu et generosa carnis propagine honorifice illustrabant annis multis.

Et Henricus de Bracton, Regis Hen' tertii temporibus, hujus regni Judex, capite primo libri sui primi, numero tertio, inquit: ego Hen. de Bracton animum erexi ad vetera judicia justorum perscrutanda diligenter, non sine vigiliis et labore, &c. adeo ut leges Angliæ vetera judicia justorum ab illo nuncupantur. Author libri qui inscribitur *Fleta* (qui regnante Edwardo primo scripsit) in operis sui exordio idem sentit quod et Glanvilla de Angliæ legum tum antiquitate tum honore; et ibidem, libr' quem scripsit cur distinxit appellatione *Fletæ* plenius tibi satisfacias: tractatus autem iste, qui *Fleta* merito poterit appellari; quia in *Fleta*, de jure Anglorum, fuit compositus. Rescript' mihi est originalium Registrum, sub Rege Henrico secundo literis consignatum quo (tempore scripsit Glanvilla) brevia sive rescripta continens originalia, quæ

multo ante subactam hanc nation' (prout constat in memorata illa Tertiæ Partis Præfatione) in vigore extiterunt pleno ut et hodie existunt; eis modo exceptis quæ in comitiis Parliamentariis instituta aut immutata fuere, qui liber, omnium de lege municipali extantium, est vetustissimus, adeoque antiquus ut de origine ejus nihil prorsus ostendatur.

Ad secundam quæstion' affirmo, quod statuta, quæ inscribuntur, Mag' Chart', Charta de Foresta, Merton, Marlebridge, Westm' 1. De Bigamis, Gloucest', Westm' 2. Articuli super chartas, Articuli cleri, Statutum Ebo- raic', Prærogativa Reg', et antiqua alia nonnulla (inter quæ statutum anno vice- simo quinto Edwardi tertii de crimine læsæ majestatis sancitum omittendum non est) plerisq' quorum solum- modo declaratur lex muni- cipalis: una cum rescriptis originalibus de actionibus sive placitis (ut loquimur) communibus, quæ in Re- gistro comprehenduntur, cum et exquisitæ et veræ indicandi crimina delin- quentium formulæ, sunt corpus ipsum et quasi textus legum Angliæ muni- cipal': causarumque et judi- ciorum relatorum vetus- tiores libri olim editi, et monumenta seu acta pub-

(in whose time Glanvill wrote) containing the origi- nal writs which were long before the Conquest, as in the said Preface to the Third Part appeareth, and yet also remaining in force, such excepted as have been instituted or altered by acts of Parliament since that time, which is the most an- cient book yet extant of the common law, and so ancient, as the beginning whereof cannot be shewed.

To the second question I do affirm, that the statutes of Magna Charta, Charta de Foresta, Merton, Marle- bridge, Westm' 1. De Bi- gamis, Glouc', Westm' 2. Articuli super cartas, Arti- culi Cleri, Statutum Ebo- raic', Prærogativa Regis, and some few others, that be ancient, amongst which, the statute of 25 Ed. 3. is not to be omitted, touching treasons (which for the most part are but declarations of the common law) together with the original writs con- tained in the Register con- cerning Common Pleas, and the exact and true forms of indictments and judgments thereupon in criminal cau- ses, are the very body, and as it were the very text of the common laws of Eng- land. And our year books and records yet extant for above these four hundred years, are but commenta- ries and expositions of those

Hale's Hist.
Co. Lit. 68.

laws, original writs, indictments and judgments. By two cases, the one of Jehu Webb, and the other called Blackamore's case, now among others published and resolved in this blessed and flourishing spring-time of his Majesty's justice, specially (among many others) it appeareth, that our book-cases and records are also right commentaries, and true expositions of statutes and acts of Parliament. And for an example of an original writ, among many others, I refer the studious reader especially to Caly's case in Pasch' 26 of the reign of the late Queen Elizabeth, of ever blessed memory, now published, whereby it more clearly appeareth how judicious the opinion of Justice Fitzh. is in his Preface to his Na. Br. where he saith, that original writs are the foundations whereupon the law dependeth, and how truly he calleth them the principles of the law, and fortifieth also the opinion of Bracton, lib. 5. fol. 413. where he saith, that (breve formatum est ad similitud' regulæ juris) which case I have reported in that form to this end, that students seeing the singular use of original writs, will in the beginning of their study learn them, or at least the principallest of them without book, whereby

lica, ab annis quadringentis et ultra in hunc usque diem deducta et summa fide reservata, sunt commentaria tantum, et ear' leg', rescript' originalium, et indicandi formularum expositiones. Et cum alias, tum præcipue ex duobus causis (altera, scil', Jehu Webb, altera Blackamore) jam prelo, ut et aliæ, commissis (vereque hoc faustissimo immo florentissimo Justiciæ a Regia Majestate unicuique administratæ determinatis) patet clarissime libros nostros et monumenta, apta fore commentaria, et veras statutorum decretorumque comitialium explicationes. Et, si studiosus lector exemplum de rescripto originali quæsiverit, casum Calye, in termino Paschæ 26 Eliz. Reginæ felicissimæ memoriæ agitatum, et jam editum, consulat, ex quo clare patet consultam imprimis fuisse Judicis Fitzherbert opinionem judicioque latam optimo in præmio libri sui de Natura Brevium, ubi asserit rescripta originalia fundamenta esse, et totius legis quasi cardines; et quam recte ab eo juris principia appellantur: firmat etiam hic casus illud quod sentit Bracton, lib. 5. fol. 414. ubi dicit, Breve formatum esse ad similitudinem regulæ juris, quem casum in medium proferendo hunc

mihi proposui finem, quod usum singularem brevium originalium ex hoc perspicientes studiosi, dum adhuc in hoc literarum genere tyrones sunt, ea vel saltem eorum in usu frequentiora, memoriter ediscerent; quod si faciant ad hæc tria pluri momenti facillime perveniant. Primo, rectius librorum apprehendant rationem: secundo, sensum sententiamque juris genuinam feliciter intelligant: exquisitam denique causas agendi formam assequantur. Et casus de Barratria (ut loquimur) formulam indicandi crimina recte tibi demonstrat.

Assisarum actionumque realium intermissio, bina in rempub' induxerunt mala, et tertiam (si modo non surreperit) sequi verisimile est. Primolitus multitudo in actionibus personalibus quibus liberi tenementi ei juris hæreditarii realitas controversa est, in subditi impensam et vexationem minime tolerandas. Secundo, contentiones multiplices in uno eodemque casu, adeo ut sententiæ duodecim virorum juratorum (quas veredicta vocamus) diversæ sæpius feruntur ex utraque parte; nec tamen lis demum inter partes aliquatenus dirimitur, nec fixa alterutri seu pacifica manet possessio, utrinque licet frequentius exploretur pariter ac judicetur.

they shall attain unto three things of no small moment: 1. To the right understanding of their books: 2. To the true sense and judgment of law: and, lastly, to the exquisite form and manner of pleading. And the case of Barretty standeth for an example of an indictment.

The neglect of assises and real actions hath produced two inconveniencies in the commonwealth, and a 3d is (if it be not stept on already) like to ensue: 1. The multitude of suits in personal actions, wherein the realty of freehold and inheritance is tried, to the intolerable charge and vexation of the subject. 2. Multiplicity of suits in one and the same case; wherein oftentimes there are divers verdicts on the one side, and divers on the other, and yet the plaintiff or defendant can come to no finite end, nor can hold the possession in quiet, though it be often tried and adjudged for either party.

Vid. Lord Ellenborough's observations on this paragraph. Outram s. Morewood, 5 East. 355.

6 Co. 7.
4 Co. 43.

And this groweth, for that the right institution of the law is not observed, to the unjust slander of the common law, and to the intolerable hindrance of the commonwealth. In personal actions concerning debts, goods and chattels, a recovery or bar in one action is a bar in another, and there is an end of the controversy. In real actions for freehold and inheritance, being of a higher and worthier nature, and standing upon greater variety of titles and difficulties in law, there could not be above two trials, or at the most (and that very rarely) three, and in the mean time, after one recovery, the possession resteth quiet: 3. The discontinuance of real actions will produce in the end two dangerous effects, viz. want of true judgment in the professors of the law, and gross ignorance in clerks of the right entries and proceedings in those cases. We see that works of nature are best preserved from their own beginnings, frames of policy are best strengthened from the same ground they were first founded, and justice is ever best administered when laws be executed according to their true and genuine institution. And therefore to the end the ancient and excellent institution of the

Et hoc fit, dum recta legum institutio declinatur: unde lex municipalis dente capitur maledico, et detrimenta reipublicæ eveniunt non ferenda. In actionibus personalibus de ære alieno, bonis, et catallis (ut dicimus) recuperatio vel barra (ut apud nos est) in una actione, barra est et in alia, et hujusmodi litis finis est. In actionibus vero realibus de libero tenemento et hæreditate (quæ altioris prorsus sunt naturæ et dignioris, et in quibus jura dissimiliora decernuntur, subtilioresque agitantur in lege questiones) ultra duas, vel tres (idque rarissime) esse nequeant explorationes, et interim, una jam habita recuperatione, quiete agitur possessio. Tertio, actionum realium desuetudo duo efficient periculosa, videlicet, veri judicii in legum professoribus defectum, et in clericis, formularum rite intrandi, aptique in iisdem causis processus crassam ignorantiam. Opera naturæ suis a primordiis maxime præservari perspicimus, res politicæ ab iisd' optime fundamentis muniuntur a quibus primo instituuntur, et justitia æquius semper administratur, quum leges secund' veram et genuinam earum institutionem executioni mandentur: ideoque ut antiqua legum municipalium et præclara in-

stitutio ad reipub' utilitatem retineatur (expedit enim reipub', ut sit finis litium) duos in publicum protuli casus de Assisis, eo quod breve de Assisa (in casu quo habeatur) optimum est et maxime festinum remedium : et casus Buckmere, et Syms de brevibus de Formedon (ut loquimur) in remanere : et casum Edward Altham de brevi de dote recuperanda.

Et nos, quos regia majestas publicos in hoc suo regno substituit Judices, moras omnes supervacaneas et indebitas, omnesque fictas et curiosas nimis in placitando agitationes (quoad possumus) penitus amputare statuimus : quæ, dum irrepserunt, multum nuper in causa fuerunt quare actiones reales et præsertim de Assisis brevibus ut quondam fuerint, non adeo sunt frequentia.

Et quamvis in actionibus realibus, sicut causæ pondus in se exigit, longiora tempora in processu, quam in actionibus personalibus concedantur, sicut in libello Judicis Fortescue, cap. 53. manifestum est (ubi apparet dilationes illas nec nimis longas esse, nec justa non nisi de causa admissas : crebro enim (inquit ille) in deliberationibus judicia maturescunt, sed

common law might be continued for the good of the commonwealth, (for it is convenient for the commonwealth, that there be an end of controversies,) I have therefore reported two cases of Assises, for that the writ of Assise (in case where it lieth) is optimum et maxime festinum remedium : and the cases of Buckmere and Syms of writs of Formedon in remainder : Edw. Altham's case of a writ of dower.

And we, that are Judges of the realm, have resolved to cut off all superfluous and unjust delays, and as much as we can, all feigned dilatory and curious pleadings: the admittance whereof, of late time, hath been a great cause why real actions, and specially writs of Assise, have not been so frequent as they have formerly been.

And though in real actions, as the weight of the cause requireth, there are longer times given in the proceeding, than in personal actions, as appeareth in Justice Fortescue's book, cap. 53. (where it appeareth that those times are neither overlong, nor without just cause ; for many times in deliberations, judgments grow to ripeness, but in over-hasty process never :)

Fortescue,
cap. 53.

yet shall the demandant come to a timely final end by these real actions, which he shall never do by prosecution of personal actions for the trial of freehold or inheritance. And they that well observe the three parts of the Reports in the reign of King Edward the Third, shall find few or no actions of trespass or personal actions brought concerning any lands or tenements, but either where no title of freehold or inheritance came in question, or where the plaintiff could not have any real action: and, therefore, amongst many others it appeareth in an action of trespass, *quare clausum fregit* brought by the Bishop of Coventry and Litchfield, in 6 Ed. 3. fol. 34 b. exception was taken to the replication of the bishop for that he pleaded in the realty, for always in those days real cases were determined in real actions, which made Judges in those times to merit that honourable testimony which Thirning, Chief Justice, attributeth to them in the 12th year of the reign of King Henry IV. that they were the greatest sages that ever were: and that in the reign of King Edward III. the law was of the greatest perfection that ever it was; and that pleading (the greatest honour and ornament of

in accelerato processu nunquam :) petens tamen tempore opportuno per has reales actiones ad finem litis pervenerit; ad quem per action' personalium prosecutionem de libero tenemento vel hæreditate experiundo, nunquam potest. Tres autem Relationum partes regnante Ed. 3. promulgatas qui pensitaverint, paucas aut omnino nullas transgression', aliasque personales action' de terris seu tenementis latas invenerint, nisi ubi nulla de libero tenemento aut jure hæreditario quæstio oriebatur, aut ubi petenti nulla realis actio data fuit. Liquet igitur, cum alias tum præcipue ex actione quadam transgressionis, *Quare clausum fregit*, per Episcopum Covent' et Litchfield' prosecuta in 6 Edwardi 3. fol. 34. b. ad Episcopi replicationem factam fuisse exceptionem, quod in realitate litem agitabat, semper enim, ut tunc se habuerunt tempora, casus reales in actionibus realib' discussi fuerunt: unde eorum temporum Judices præclarum illud meruere testimonium, quod Thirning, Justiciarius Capitalis, illis attribuit anno Hen. 4. 12. videlicet, quod aliorum omn' longe fuerunt consultissimi simul et sapientissimi; et quod sub Rege

6 E. 3. fol. 34 b.

Edw. 3. majorem quam antea habuisset lex perfectionem ; et quod causarum in jure agitatio (summum legis decus et ornamentum) ad eam in ejusdem Regis temporibus crevisset excellentiam, ut superiorum temporum agitationes, si ad illas sub Rege Ed. 3. compararentur, mancas quasi et imbelles a Thirning existimarentur.

Magnam ducatus Cornubiæ casum variis de causis retuli. Primo, quamvis ille idem casus olim (ut hæc mearum Relationum parte constare poterit) adjudicatus fuerit ; de eodem tamen jamdudum quæstio nova exorta est, partim quod judicia inter alia Regis monumenta, paucis cognita, clausa asservantur, et partim quod judiciorum ration' et causæ (ut legis mos est) in iisdem non expressæ monumentis, nulli plene et integre satisfecerunt ; præsertim vero, quod nulla de eorum determinationum ac judiciorum veris causis et rationibus facta fuerit et divulgata relatio. Secundo, quod illi qui nullam inde habent partem, de vero possessionum hujus ducatus statu instituuntur, eoque moneantur ne cum iis pactio nemineant qui possessiones inde aliquas emerunt aut adepti fuerunt : et quod hi qui ullam ejusdem par-

the law) grew in the reign of that King to that excellency, as that the pleading in former times having regard to the pleadings in the reign of King Edward III. holden by Thirning to be but feeble.

I have reported the great case of the duchy of Cornwall for divers causes. 1. Although this very case hath been long since (as shall appear in this Report) judicially adjudged, yet hath the same of late been called in question again, partly for that the said judgments remain privately amongst the rest of the King's records unknown but to a few, and partly, for that the reasons and causes of the judgments being (according to law) not expressed in the record itself, gave no full and clear satisfaction : but principally for that there was no report made and published of the true causes and reasons of those resolutions and judgments. 2. To the end that such as have not any part thereof, may hereby be instructed of the true state of the possessions of this duchy, and by this means be admonished how they deal with any that have bought or purchased

any of these possessions ; and that such as have acquired or gotten any of them, knowing that the judgment was given in this case, both upon many direct authorities in the point, and upon plain and demonstrative reason (the two main causes of true satisfaction) may therewith rest satisfied. The last, but not the least, is for that the most noble and excellent Prince, who is *omine*, *nomine*, *numine* magnus, and the greatest that ever was before him, hath in his first cause in hoc forensi dicendi genere gotten victory. I have for some respects reported the same in Latin, wherein I have been contented, potius scribere proprie quam Latine; and for that the words of art which will bear no translation, are herein so many and so frequent, I have added the report thereof in the vulgar language; that the reader may use either of them at his pleasure. There are certain other cases now published by me, concerning some of the most abstruse, dark, and difficult points in the law, and yet very necessary to be known, as in Arthur Blackamore's case concerning amendments, Beecher's case of a Retraxit, departure in despite of the Court, and of fines and ameracements, Greisley's case of afferring

tem acquisiverunt, aliove pacto nacti sunt, intelligentes sententiam, in hoc casu latam fuisse cum ex quamplurimis directis admodum et luculentis auctoritatibus et indiciis, tum ex plena demonstrativaque ratione (duobus veris et præcipuis satisfaciendi causis) habeant quo acquiescant. Ultima hunc casum referendi causa (nequam tamen minima) est, quod termaximus ille et excellentissimus Princeps, qui *omine*, *nomine*, *numine* magnus, et omnium qui antecesserunt illustrissimus, in prima sua causa palmam in hoc forensi dicendi genere adeptus est. Nonnullæ mihi animum induxerunt rationes, ut Latine in scripta redigerem hunc casum, quod dum facerem, contentus fui potius scribere proprie quam Latine, et quia voces artis (in aliam se converti linguam minime patientes) adeo multæ sunt et frequenter intercedentes, lingua etiam assueta hæc loquitur relatio; utraque igitur lector pro animo suo utatur. Quosdam alios a me modo relatus habes casus de quæstionibus in lege nonnullis abstrusissimis, difficillimis, et spinosissimis, intellectu tamen valde necessariis, utputa casum Arthuri Blackamore de amendmentibus, casum Beecher de formula juris

quam dicimus retraxit, de recessu in contemptum curiæ, et de multis (quas fines et amerciamenta vocamus) casum Griesley de amerciamensis afferendis, et nonnullos alios. Hos, de industria, tam perspicue, luculenter, et summam quam potui, perfeci: leges enim plane sunt dissimiles illis naturæ quæ gratius per cristallum aut succinum pelluceant quam si nuda conspiciantur, nec pictis assimulentur tabulis quæ delicias tum affuerunt maximas, quum recentibus adhuc et floridis poliantur coloribus, et umbris graphice inductis haud parum illustrantur et exornantur.

Utrum res ipsa, sive ætas mea provecior (anno jam sexagesimo ætatis meæ prope modum acto) sive aliud quicquam in causa est: labore magis, in hoc octavo opusculo quam superiorum aliquibus, enisum me fuisse pro certo scio: Deus tamen optimus maximus propitia sua benignitate (dum in gravioribus reipublicæ negotiis versatus fui) hoc ut perficerem vires dedit. Et, ut dicunt naturalistæ, sicut nulla sylvarum aut camporum volatiliū genera sunt, quæ non aliquid afferunt ad nidum aquileum construendum et adornandum nonnulla cinnamoni aliaque magni pretii et momenti, nonnulla juni-

of amercements, and some others. And I have of purpose done these as plainly and clearly, and therewith as briefly, as I could. For the laws are not like to those things of nature, which shine much brighter thro' crystal or amber, than if they be beheld naked: nor like to pictures that ever delight most when they are garnished and adorned with fresh and lively colours, and are much set out and graced by artificial shadows.

And whether it be in respect of the matter, or my years growing fast on, being now in the 60th year of my age, or for what other respect soever it be, sure I am, I have felt this Eighth work much more painful than any of the other have been to me. And yet hath Almighty God of his great goodness, (amidst my public employments) enabled me herewith. And as the naturalists say, that there is no kind of bird or fowl of the wood or of the plain that doth not bring somewhat to the building and garnishing the eagle's nest, some cinnamon, and others things of price, and some juniper,

and such like of lesser value, every one according to their quality, power, and ability: so ought every man, according to his power, place, and capacity, to bring somewhat, not only to the profit and adorning of our dear country (our great eagle's nest) but therein also, as much as such mean instruments can, to express their inward intention and desire, to honour the peaceable days of his Majesty's happy and blessed government to all posterity. And for that I have been called to this place of judicature by his Majesty's exceeding grace and favour, I hold it my duty, having observed many things concerning my profession, to publish amongst others, certain cases that have been adjudged and resolved since his Majesty's reign, in his highest courts of ordinary justice, in this calm and flourishing spring-time of his Majesty's justice, amounting with those of my former edition in all to 84. And (if it shall please God) I intend hereafter to set out another work, whereof I have only collected the materials, but not reduced them to such a form as I intend, lest if I should leave it as it is, it might, after my death be published (as hath been done in the like case) before

perum et talia id genus minoris pretii, secundum illorum qualitatem, potentiam, et facultatem: ita cuilibet secundum potestatem, ordinem et mentis acumen, addendum est aliquid, non solum patriæ nostræ charissimæ (aquilæ nostræ nido potentissimæ) ut proficit et illustret, sed in eo etiam pro virili, ut interiorum animi intentionem et affectum exprimat, ad regię Majestatis dies pacificos, gubernationemque ejus felicissimam atque beatissimam in posterum celebrandum. Ego vero, cum suæ Majestatis gratia ad hanc sedem judicariam summo cum favore me evocarit, in officio meo me defuisse existimavi, (si non, dum multa mea in professione observavi, in lucem ederem casus nonnullos inter alios) sub regia sua Majestate in eminentissimis justitiæ ordinariæ curiis judicatos et discussos, serenissimo hoc florentissimoque vere Justitiæ a sua Majestate pie administratæ; qui casus cum illis editionum mearum superiorum numerum attingunt octaginta quatuor. Et (si Deo placeat) opus aliud posthac edere institui; cuius quidem elementa tantum collegi, non tamen ut propositum mihi est, formavi, ne forsitan si relinquerem quaecunque sit

post meam ex hac vita
emigrationem (quod re pari
accidisse vidimus) promul-
garetur imperfectum. Sin-
gularis vestrum superior'
mearum Relationum ap-
probatio, continuis aliar'
lucubrationum associata
votis, ad onus hoc aggre-
diendum multum me inci-
tavit. Et, si non mino-
rem vos vestris in studiis
fructum ex his percepefi-
tis, quam ego ex animo vo-
bis opto, vosque (scientiæ
vestra ex cupiditate) spe-
ratis, faciles meæ mihi
erunt vigiliæ, votis enim
meis abunde satisfactum
erit.

it be perfected. Your ex-
traordinary allowance of
my former works, together
with your continual and
earnest desire of other edi-
tions, have much encou-
raged me to undertake these
pains: and if you shall
reap in your studies such
profits thereby, as I from
my heart desire, and as you
(from your desire of know-
ledge) do expect, then
shall my labours seem light
unto me, for my expecta-
tion shall be satisfied.

THE PRINCE'S CASE.

[1 a.]

Hil. 3 Jac. 1.

In Chancery.

Pleas before the Lord the now King in his Chancery at Westminster, in the County of Middlesex, of Hilary Term, in the third Year of the Lord James by the Grace of God, King of England, France, and Ireland; and of Scotland the 39th. Part VIII.—1 a.

THE lord the now King sent his close writ, directed to the Sheriff of Cornwall in these words. James by the grace of God of England, Scotland, France, and Ireland, King, defender of the faith, &c. To the Sheriff of Cornwall greeting, Whereas in the statute made in the Parliament of the lord Edward the Third, late King of England, in the 11th year of his reign, holden at Westminster, in the county of Middlesex, it was amongst other things enacted by authority of the said Parliament, that the eldest son of the King of England, who should be inheritable to the kingdom of England, should be Duke of Cornwall; and that the duchy of Cornwall should always be, from thenceforth to the eldest son of the Kings of England, who should be next heir of the aforesaid kingdom, and that the aforesaid eldest son of the Kings of England should have and enjoy towards their maintenance and for support of their princely state and dignity all the whole duchy of Cornwall, and all castles, honours, lordships, manors, lands, tenements, and all other hereditaments to the said duchy belonging or appertaining, or reputed or taken to be part, parcel, or member of the said duchy. And whereas the said late King Edward the Third, in the aforesaid Parliament, held in the said 11th year of his reign, by his certain charter (made) with the common assent and council of the Prelates, Earls, Barons, and other of the King's Council in the said Parliament called together, and by authority of the same Parliament, had given to Edward then Earl of Chester, his first begotten son, the *Scire facias* to repeal letters patent of the late Q. Eliz. dated May 2, in the 37th year of her reign.

Cornwall, and the castle of W., &c. given to him with special limitations, so as they shall not be severed, with a clause of revivification, although the special limitation at any time should cease. 11 Edw. 3.

[* 1 b.]. The prince created duke of

name and honour of Duke of Cornwall, and him in the dukedom of Cornwall established, and by the same his charter, with the common assent and council aforesaid, gave and granted to his said son, in the name and title of the duchy aforesaid, and under the name and honour of Duke of the said place, amongst other things the castle of Wallingford, with its hamlets and members, and the yearly farm of the town of Wallingford, with the honours of Wallingford, and of St. Valerie with the appurtenances in the county of Oxford and other counties, wheresoever the said honours were, to have and to hold to the same Duke and to the first begotten sons of him and his heirs, Kings of England, and of the same place Dukes in the kingdom of England, therein to succeed, together with the Knights fees, advowsons of churches, abbeys, priories, hospitals, chapels, and with hundreds, fishings, forests, chaces, parks, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villains, and all other things to the aforesaid castles, towns, honours, lands, and tenements, howsoever belonging or appertaining, of the aforesaid King Edward the Third, and his heirs for ever. And the said late King Edward the Third, by his charter aforesaid, in Parliament aforesaid, with the common consent aforesaid, and by authority of that Parliament, the aforesaid castle of Wallingford, and other the premises with the appurtenances, amongst other things, to the said duchy annexed and united, to remain to the said duchy for ever: so as from the said duchy at any time by no means they be separated, nor to any other, or others, than to the Dukes of the same place, by the aforesaid late King, or his heirs should be given, or any ways granted, so also that to the aforesaid Duke, and other Dukes of the same place, deceasing, and to the son or sons to whom the aforesaid duchy, by colour of the grants aforesaid it should belong, not appearing, the said duchy, with the aforesaid castle, and other the premises being granted, to the aforesaid late King, or his heirs, Kings of England, should return into the hands of him the said late King, and of his heirs Kings of England to be holden, until any of such son or sons of the said kingdom of England hereditably to succeed, should appear (as is aforesaid) to whom successively the said duchy with the appurtenances, the aforesaid late King for him and his heirs, granted and willed to be delivered, to be holden of the said King, and his heirs for ever. And whereas likewise, by a certain act made in parliament of the lord Henry, late King of England the Eighth, holden at Westminster aforesaid, that is to say, in the second sessions of the same parliament, begun and holden the 12th day of April, in the 31st year of the reign of the said *lord late King Henry the Eighth, and by divers prorogations until the 25th day of May, in the 32d year of the reign of the said late King Henry the Eighth, and from thence holden and continued, until the dissolution of the said Parliament, the 24th day of July, in the 32d year aforesaid, reciting, that whereas in the Parliament holden, in the 11th year of the reign of the late King of famous

Act 32 H. 8.

[* 2 a.]

Reciting the
11th Edw. 3. by
which the
prince was
created Duke

of Cornwall, and the possessions of the dukedom of Cornwall given to him, &c.

memory King Edward the Third, amongst other things established; it was enacted and ordained, that the eldest son of the King of England, who shall be inheritable to this kingdom of England, should be Duke of Cornwall, and that the same duchy of Cornwall should ever be to the eldest son of the King of England, who should be next heir of the said kingdom; and that he should have and enjoy towards the maintenance and support of his princely estate the whole and entire duchy of Cornwall, and all castles, honours, dominions, manors, lands, tenements, and all other hereditaments belonging or appertaining to the said duchy, or reputed or taken to be part, parcel, or member of the said duchy: and for that, the honour and castle of Wallingford in the county of Berks then was, and from long time had been part and parcel of the inheritance and possessions of the said Duke of Cornwall, and reputed and taken to be a member of the said duchy; which honour and castle lay near to the manor of the said late King Henry the Eighth of Newelm, otherwise Ewelme in the county of Oxford, and was very commodious, decent and pleasant for the said late King Henry the Eighth. In consideration whereof, and for other urgent causes, the said late King Henry the Eighth especially moving, it was enacted and ordained by the authority of the same Parliament of the said late King Henry the Eighth, that the said honour and castle of Wallingford, and all dominions, manors, lands, tenements, and other hereditaments whatsoever they should be, being parts, parcels, or members of the said honour and castle, or appendant, or belonging to the said honour and castle, or to any lordship or manor to the same appertaining, or reputed, or taken to be part or parcel of the said honour and castle, or any member thereof, should be from thenceforth for ever by authority of the said Parliament severed, disannexed, and dismembered from the said duchy of Cornwall, and should not be in any manner from thence after reputed, called, accepted, or taken by the name of the honour of Wallingford, nor be any part, parcel, or member of the said duchy of Cornwall: and that the aforesaid manor of the said King of Newelm, otherwise Ewelme, from thence for ever after, should be named, called, accepted, and be reputed and adjudged to be the honour of Newelm, otherwise Ewelme. And that the said late King Henry the Eighth, should have and enjoy the like *liberties, franchises, privileges, royalties, and jurisdictions, as well in the aforesaid honour of Newelm otherwise Ewelme, as in the aforesaid manors, castles, lands, tenements, and hereditaments, being part, parcel, or member of the said honour of Wallingford, to all intents and purposes as were in any manner belonging, appertaining, or used in or to the said honour of Wallingford. And that the like process, suits, and pleas should be for ever holden, received, and should be used in the said honour of Newelm, otherwise Ewelme, as at the first day of the same Parliament were used or exercised in the said honour of Wallingford: and that the said late King Henry the Eighth should have to him, his heirs and successors for ever, the said honour and castle of Wallingford, and all

[* 2 b.]

lordships, manors, lands, tenements, and other hereditaments whatsoever, appertaining to the said honour or castle, or reputed, or taken to be any part of the possessions, or parcel or member of the said honour or castle, from thence for ever to be severed and divided from the aforesaid duchy : and that the said honour and castle of Wallingford, from thence for ever should be named and called the castle and manor of Wallingford. And also that the said castle and manor of Wallingford, and all lordships, manors, lands, tenements, and other hereditaments whatsoever, which then should be belonging or appertaining to the said castle and manor, or reputed or taken to be any part, parcel, or member thereof; and all manner of liberties, franchises, privileges, royalties, and jurisdictions before that time used within the said honour of Wallingford, from thence for ever should be united, annexed, knit, adjudged, deemed, accepted, reputed, and called part, parcel, and member of the said honour of Newelm, otherwise Ewelme, in the aforesaid county of Oxford : and further it was enacted by authority of the aforesaid Parliament of the aforesaid late King Henry the Eighth, that all and singular person and persons who then held any manors, lands, tenements, or hereditaments of the aforesaid late King Henry the Eighth, and of the most excellent and undoubted Prince Edward, the son and heir apparent of the said late King Henry the Eighth, as of the said honour of Wallingford, or of any other lordships or manors being parcel or member of the said honour of Wallingford, from thence for ever after should hold their said manors, lands, tenements, and hereditaments of the said late King Henry the Eighth, his heirs and successors, as of the aforesaid manor and his castle of Wallingford, or of the said lordships or manors being parcel and members of the said honour of Wallingford, parcel of the said honour of Newelm, otherwise Ewelme, by the said rents, suits, customs, and services, as they and every of them held, paid, or did before the making of the said act of *Parliament, and not by more or other rents, suits, customs, or services : saving to every person and persons, bodies corporate or politic, their heirs and successors, and to every of them, other than the most excellent and undoubted lord Prince Edward which then was, and his heirs, and to any other who from thence for ever should happen to be the King's eldest son, and next heir of the crown of this kingdom of England, all such right, title, interest, possession, fees, offices, annuities, rents, commons, and all other commodities and hereditaments whatsoever, which they, or any other of them lawfully held, had, could, or ought to have had, if the said act of Parliament had never been had or made : and further, it was enacted by the authority of the aforesaid Parliament, of the aforesaid late King Henry the Eighth, that the aforesaid excellent and undoubted Prince Edward, which then was, and every other who from thenceforth for ever should happen to be the eldest son of the King, and next heir of the crown of this kingdom, should have, hold, and enjoy for ever annexed,

[* 3 a.]

The three manors, W. T., T., and L. made parcel of the duchy of Cornwall, for ever to all intents and purposes.

united, and knit, to the aforesaid duchy of Cornwall, for and in full recompence of the aforesaid honour and castle of Wallingford, and other the premises in the said act before mentioned, to the said honour of Wallingford then before belonging as part and parcel of the said duchy of Cornwall, the manor of West Taunton, Trelowia, and Landalph, with the appurtenances, in the county of Cornwall, amongst other things, in such manner and form, and of such like estate, as the said excellent and undoubted Prince Edward, before the making of the same act of Parliament, had, held, or enjoyed the aforesaid honour and castle of Wallingford, and all other the premises, parcel of the said honour. And that all and singular the aforesaid manors, with all and singular their appurtenances, then amongst other things limited and assigned, by the said act in the aforesaid Parliament of the aforesaid late King Henry the 8th, to the aforesaid duchy of Cornwall, and every of them, from thence for ever, should be reputed, deemed, adjudged, accepted, and taken, by authority of the same Parliament, as part, parcel, and member of the said duchy of Cornwall, in such and the like manner and form, to all purposes and intents, as the said honour and castle of Wallingford, and the members and parcels of the same, were, before the making of the same act, any act, law, custom, or use, to the contrary notwithstanding, as by the said act, in the aforesaid Parliament of the aforesaid late King Henry the 8th, made, amongst other things it more fully appears: and whereas before, and until the time of the making of the aforesaid act of Parliament, made in the aforesaid Parliament of the aforesaid late King Henry the 8th, the aforesaid honour and castle of Wallingford, and the members and parcel thereof, were part, parcel, and members *of the aforesaid duchy of Cornwall, according to the form and effect of the aforesaid charter and grant by the aforesaid late King Edward the Third, with the common assent aforesaid, and authority of his Parliament aforesaid, (as before is said) made, and as in the aforesaid charter are mentioned, and above recited, and the aforesaid excellent and undoubted Prince Edward, in the aforesaid act made in the aforesaid Parliament of the aforesaid late King Henry the Eighth, before the time of making of the aforesaid act made in the Parliament aforesaid of the aforesaid late King Henry the Eighth, had, held, and enjoyed the aforesaid honour and castle of Wallingford, and other the premises, parcel of the same honour, in such manner and form, and of such estate as is enacted and limited in the aforesaid charter and grant aforesaid of the aforesaid late King Edward III., in the year of his reign the 11th aforesaid, by the authority of Parliament made as before is said. And the aforesaid honour and castle of Wallingford in the aforesaid act, made in the said Parliament of the said late King Henry VIII. mentioned, and the aforesaid Castle of Wallingford, with the hamlets and members thereof: and the aforesaid honour of Wallingford, with the appurtenances, in the aforesaid charter and grant, by the aforesaid late King Edward the Third, as before is said,

[* 3 b.]

made, specified, are one and the same, and not others or divers. By virtue of which the said late Prince Edward, eldest son of the aforesaid late King Henry the Eighth, and Duke of Cornwall, was seised of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances, in his demesne as of fee, as parcel of his Duchy of Cornwall aforesaid, according to the form and effect of the aforesaid act of Parliament; and he thereof being so seised, the aforesaid late King Henry the Eighth, afterwards at Westminster aforesaid, died, the said Edward, late Prince, being the son and heir of the aforesaid late King Henry the 8th. And the said Edward, late Prince to the said King Henry the 8th, in the aforesaid kingdom of England, by right of inheritance succeeded, and King of the aforesaid kingdom of England, by the name of Edward the Sixth, King of England, came to be. And afterwards the said Edward the Sixth, late King of England, at Westminster aforesaid, died without heir of his body begotten; the Lady Mary, late Queen of England, being sister and heir of the said late King Edward the Sixth; and the aforesaid Lady Mary to the said late King Edward the 6th, in the aforesaid kingdom of England, by right of inheritance succeeded, and became Queen of the aforesaid kingdom of England; and afterwards the said Queen Mary at Westminster aforesaid, died, without heir of her body begotten; the Lady Elizabeth, late Queen of England, being sister and heir of the aforesaid late Queen Mary; the aforesaid Lady Elizabeth to the said late Queen

[* 4 a.] *Mary in the aforesaid kingdom of England, by right of inheritance succeeded, and became Queen of the kingdom of England; and afterwards, the said Queen Elizabeth at Westminster aforesaid, died, without heir of her body begotten, we then and yet being cousin and heir to the said late Queen Elizabeth; and we succeeded to the said late Queen Elizabeth, in right of inheritance, in the same kingdom of England, and became, and now are King of England; and now the most excellent Prince Henry our eldest son, now Duke of Cornwall, hath requested us, that whereas the aforesaid lady Elizabeth, late Queen of England, by her letters patent sealed with the great seal of England, bearing date at Westminster aforesaid, the second day of May, in the 37th year of her reign, granted to Gellio Merick, then Esq., afterwards Knight, now deceased, and Henry Lindley, then Esq., now Knight, the aforesaid manors of West Taunton, Trelowia, and Landalph with the appurtenances, to have and to hold, to them the said Gellio Meyrick and Henry Lindley, and their heirs for ever, as in the letters patents thereof more fully it is contained. And whereas the aforesaid manors of West Taunton, Trelowia, and Landalph, to the aforesaid duchy (as is said) annexed and united to the same now Duke, by virtue of the gift, grant, and union aforesaid, by the authority of Parliament aforesaid, belonged, and yet ought to belong, and were members and parcel of the same duchy, and yet are, as the said now Prince and Duke, by ways and means convenient, is ready to shew; that we would the said letters patents aforesaid, of the afore-

Queen Eliz. by
her letters
patent, granted
to G. M. now
deceased, and
H. L. the
aforesaid
manors of
W. T., T., &c.

said manors of West Taunton, Trelowia, and Landalph, as before is said, made, revoke, and annul, and the said manors with the appurtenances seise into our hands; that we cause the said manors to the said now Duke, as members and parcel of the duchy aforesaid, to have and to hold, according to the form and effect of the gift, grant and union aforesaid to be delivered: we, willing to do in this behalf what is just, command you that, by good and lawful men of your bailiwick, you give notice to the aforesaid Henry Lindley, Knt., and John Hele, Knt., Serjeant-at-law, tenants of the said manors of West Taunton, Trelowia, and Landalph, and also to whosoever other or others, tenants of the said manors of West Taunton, Trelowia, and Landalph, or any of them, that they be before us in our Chancery in eight days of St. Hilary next coming, wheresoever we shall be, to shew what for us or for themselves they have or can say, wherefore the letters patent aforesaid of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances (as before is said), made, ought not to be revoked and annulled, and the said manors with the appurtenances into our hands be seised, and the same, to the now Duke, as members and *parcel of the duchy aforesaid, according to the form and effect of the gift, grant, and union aforesaid, to have and to hold, to be delivered, and to do and receive, what our said Court then and there shall farther consider in this behalf: and have you there the names of those by whom you shall give them notice and this writ, witness myself at Westminster, the 18th day of November, in the year of our reign of England, France, and Ireland, the 3d, and of Scotland the 39th; and now at this day, that is to say, the aforesaid eight days of St. Hilary, before the said Lord the King that now is, in his said Court of Chancery, here cometh Edward Coke, Knight, Attorney-General of the said Lord the King that now is, who prosecuteth in this behalf for the said Lord the King, in his proper person. And Francis Godolphin, Knight, being Sheriff of the county of Cornwall, now sendeth here the writ aforesaid, served and executed, in form following, the 21st day of December, in the 3d year abovesaid, by virtue of the writ aforesaid, to him directed, that he gave warning by John Edgcombe and Walter Blunt, good and lawful men of his bailiwick, to the aforesaid Henry Lindley, Knight, and also the same day and year by the said good and lawful men, he gave warning to the aforesaid John Hele, Knt. and to one Warwick Hele, Knt., tenants of the aforesaid manors of West Taunton, Trelowia, and Landalph, abovementioned, to be before the said Lord the now King here, at this day, to shew, do, and receive, what that writ in itself requireth and demands. And the aforesaid Henry Lindley, Kt. John Hele, Kt. and Warwick Hele, Kt., the 4th day of pleas being solemnly called, by Richard Wilkinson their attorney come, and pray licence to imparl, and it is granted to them, &c., and upon this day is given to the aforesaid Henry Lindley, John Hele, and Warwick Hele, before the said Lord the King, in the said Court here, that is to say, at Westminster aforesaid, until in eight days of the Purifica-

Command to the Sheriff to summon H. L. and J. H., and the other tenants of the said manors.

[* 4 b.]

The Sheriff returns H. L., J. H., and W. H., tenants of the said three manors, summoned.

Imparliance.

tion of the blessed Mary then next, &c. wheresoever, &c., that is to say, to the aforesaid Henry, John, and Warwick, to imparl and then to answer, &c. The same day is given to the aforesaid Edward Coke, Knt., the Attorney-General of the Lord the now King, who, &c., then to be here, &c. At which eight days of the Purification of the blessed Mary, before the said Lord the King, in the said Court here, that is to say, at Westminster aforesaid, come as well the aforesaid Edward Coke, Knight, who, &c., in his proper person, as the aforesaid Henry Lindley, John Hele, and Warwick Hele, by their attorney aforesaid, and upon this the said Henry, John, and Warwick, by their attorney aforesaid, pray farther licence thereof to imparl, before the said Lord the King now in the said Court here, that is to say, at Westminster aforesaid, until in fifteen days of Easter, then next following, &c., wheresoever, &c., and then to answer, &c., and they have it, &c., and the same day is given to the aforesaid Edward Coke, Knt., the Attorney-General of the said Lord the now King, who, &c., then here, &c. At which

[* 5 a.] *fifteen days of Easter before the said lord the King that now is, in the said Court here, that is to say, at Westminster aforesaid, come as well the aforesaid Edward Coke, Attorney General of the Lord the now King, who, &c. in his proper person, as the aforesaid Henry Lindley, John Hele, and Warwick Hele, by their attorney aforesaid, and upon this the aforesaid Henry, John, and Warwick by their attorney aforesaid, farther pray leave thereof to imparl before the said lord the King, in the said Court here, that is to say, at Westminster, aforesaid, until the morrow of the Holy Trinity, then next following, wheresoever, &c. and then to answer, &c. and they have it, &c. And the same day is given to the aforesaid Edward Coke, Knt. Attorney General of the lord the King, who, &c. then here, &c. At which morrow of Holy Trinity, before the said lord the now King, in the said Court, &c. that is to say, at Westminster, aforesaid, come as well the aforesaid Edward Coke, Knt. Attorney General of the lord the now King, who, &c. in his proper person, as the aforesaid Henry Lindley, John Hele, and Warwick Hele, by their attorney aforesaid; and upon this the said Henry, John, and Warwick, by their attorney aforesaid, pray farther licence thereof to imparl, before the said lord the now King in the said Court, here, that is to say, at Westminster aforesaid, until the morrow of All-Souls then next following, wheresoever, &c. and then to answer, &c. and they have it, &c. And the same day is given to the aforesaid Edward Coke, Knt. Attorney General of the lord the now King, &c. then here, &c. At which morrow of All Souls, before the lord the King in the said Court here, that is to say, at Westminster aforesaid, come as well Henry Hobart, Knt. then Attorney General of the said lord the now King, who for the said lord the now King, prosecutes in his proper person, as the aforesaid Henry Lindley, John Hele, and Warwick Hele, by their attorney aforesaid, upon which the said Henry Lindley, by his attorney aforesaid, prayeth the hearing of the said writ of *Scire facias* above-

Farther imparlance.

Farther imparlance.

Farther imparlance

mentioned, and it is read unto him, &c. Which being read and heard, the said Henry Lindley saith, that neither the aforesaid letters patent, of the aforesaid late Queen Elizabeth, of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances in form aforesaid made, ought to be revoked and annulled, nor the said manors into the hands of the said lord the now King ought to be seised; because he saith that there is not any such record of any such act of Parliament, of the aforesaid King Edward the Third made, as in the aforesaid writ of *Scire facias*, above thereof is recited and specified; nor is there any such record of the aforesaid charter, by the aforesaid late King Edward the Third, by authority of the Parliament aforesaid, above supposed to have been made, as in the said writ of *Scire facias*, above is likewise recited and specified, and this the said Henry Lindley is ready to verify, wherefore he demands *judgment, if the aforesaid letters patent of the aforesaid late Queen Elizabeth of the manors aforesaid with their appurtenances, so as before is said, made, ought to be revoked or annulled, or the said manors with the appurtenances to be seised into the hands of the said lord the now King, &c. And the aforesaid John Hele and Warwick Hele by their attorney aforesaid, by protesting, that there is not any record of any such act of Parliament of the said 11th year of Edward, late King of England, the Third, nor that there is any such record of the aforesaid charter, by the aforesaid late King Edward the Third, by authority of Parliament, aforesaid, as in the said writ of *Scire facias* is mentioned; for plea they say, that neither the aforesaid letters patent of the aforesaid lady Elizabeth of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances, in form aforesaid made, ought to be revoked or annulled, or the manors aforesaid with the appurtenances, be seised into the hands of the lord the now King, or any of them ought to be seised, because they say, that the aforesaid late lady Queen Elizabeth, before the making of the letters patent aforesaid, to the aforesaid Gellio Meyrick and Henry Lindley, was seised in her demesne as of fee, in the right of her crown of England, of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances, in the aforesaid writ of *Scire facias* mentioned and expressed, and so thereof being seised, the said late Queen Elizabeth, by her letters patent under the great seal of England sealed bearing date at Westminster, in the county of Middlesex, the 2d day of May, in the 37th year of her reign, and here into Court brought, in consideration of the good, true, faithful, and acceptable service to the aforesaid lady the Queen, by her then well beloved faithful cousin and counsellor, Robert late Earl of Essex, of the most noble order of the Garter, Knight, and Master of her horse, before that many times done and performed, as for other good causes and considerations, the said late lady the Queen then specially moving; as also at the humble request of the said late Earl of Essex, of her special grace, certain knowledge, and

H. L. pleads as to the said two several acts of Parliament anno 11 E. 3. severally pleaded nul tiel record.

[* 5 b.]

I. H. & W. H. protesting, &c. plead the said letter's patent of Queen Eliz.

[* 6 a.]
With a *non ob-*
stante of the
said act 32 H.
8.

And convey to
themselves a
joint estate to
them and to
the heirs of the
said I. H.

mere motion, gave and granted the manors aforesaid with their appurtenances amongst other things to the aforesaid Gellio Meyrick, and Henry Lindley, then Esquires, and afterwards Knights. To have, and to hold the said manors with the appurtenances, to the aforesaid Gellio Meyrick, and Henry Lindley, their heirs and assigns for ever. And the aforesaid late lady the Queen, by the same her letters patent, granted for her, her heirs and successors, that the aforesaid Gellio Meyrick, and Henry Lindley, their heirs and assigns, should have, hold and enjoy, the aforesaid manors with the appurtenances, according to the intent of the said late Queen, in the said letters patent contained, and that the *said letters patent should be firm, valid, good, sufficient and effectual in law, against the said lady the Queen, her heirs and successors, as well in all her courts, as elsewhere, within the kingdom of England, without any manner of confirmations, licences, or tolerations of the said lady the Queen, her heirs and successors then for ever, by the aforesaid Gellio Merick, and Henry Lindley. or their heirs or assigns to be procured or obtained, notwithstanding the statute in Parliament of the Lord Henry, late King of England the Eighth, in the 37th year of his reign made, concerning the duchy of Cornwall, and honour of Newelm otherwise Ewelme, as in and by the said letters patent more fully appears. By virtue of which said letters patent, the aforesaid Gellio Merick and Henry Lindley into the aforesaid manors with their appurtenances entered, and were thereof seised in their demesne as of fee, and so thereof being seised, by their writing indented, made between the aforesaid late Earl of Essex, Gellio Merick, and Henry Lindley of the one part, and Augustine Steward and Michael Corsellis, on the other part, bearing date the 26th day of December, in the 38th year of the reign of the said late lady Queen Elizabeth, in the Court of Chancery of the aforesaid late Queen at Westminster aforesaid, within six months then next following, according to the form of the statute thereof made and provided in due manner of record inrolled, as well in consideration of the sum of 3500*l.* to the aforesaid late Earl of Essex, by the aforesaid Augustine Steward and Michael Corsellis paid, as for 20*s.* to the said Gellio and Henry, by the aforesaid Augustine and Michael likewise paid, bargained, and sold to the aforesaid Augustine and Michael, the manors aforesaid, with the appurtenances, to have and to hold to the said Augustine and Michael, their heirs and assigns for ever. By virtue of which bargain and sale, and enrolment, and by force of a certain statute in the Parliament of the lord Henry late King of England the Eighth, the 4th day of February, in the 27th year of his reign, of transferring uses into possession, at Westminster aforesaid, holden, made, and provided, the aforesaid Augustine and Michael were seised of the manors aforesaid, with the appurtenances, in his demesne as of fee; and so thereof being seised, the said Augustine and Michael, in consideration of the sum of 3500*l.* to the aforesaid Augustine and Michael, by the aforesaid John Hele paid after-

wards of the said manor with the appurtenances, enfeoffed them the said John Hele, then serjeant at law, and the aforesaid Warwick Hele, then Esquire now Knight, to have and to hold, to the said John and Warwick, and to the heirs and assigns of the aforesaid John, to the sole and proper use and behoof of the aforesaid John and Warwick, and the heirs and assigns of the said John Hele for ever. By virtue of which feoffment, the aforesaid John Hele, and Warwick Hele were, and yet are seised *of the aforesaid manors with the appurtenances, that is to say, the said John Hele, in his demesne as of fee, and the aforesaid Warwick, in his demesne as of freehold for the term of his life. And the aforesaid John Hele and Warwick Hele further say, that afterwards, in and by a certain act of Parliament of the aforesaid late Queen at Westminster aforesaid, the 27th day of October, in the 43d year of the reign of the said late Queen Elizabeth holden made (amongst other things) reciting, that whereas the said late Queen, from the 8th day of February, in the 25th year of her reign, as well for divers and great sums of money, as for divers other several considerations, had bargained, sold, given, and granted, by divers her letters patent, indentures, or other writings under the great seal of England sealed, or the seal of the duchy of Lancaster, or the seal of the county palatine of Lancaster, as well to bodies politic and corporate, as to divers and several other subjects, of the said lady the Queen, divers and several honours, manors, lands, tenements, rents, reversions, services, and other hereditaments in fee simple, fee tail, or for term of life, lives, or years, as in the said several letters patent, indentures, and other writings are mentioned and declared; it was enacted by authority of the same Parliament, to the intent that the said letters patent, indentures, or other writings, should be of good, available, and perfect force and effect, to all and singular the said late Queen's subjects, according to the true intent and effect of the same; that as well all and singular letters patent, indentures, and other writings, sealed under the great seal of England, or under the seal of the duchy of Lancaster or the seal of the county palatine of Lancaster, before then made and granted, by the aforesaid late Queen, for any sum or sums of money whatsoever, or for or upon any other considerations whatsoever, from the aforesaid 8th day of February, in the 25th year aforesaid, as all other letters patent, then after by the said late Queen to be made, for any sum or sums of money, or other considerations before the last day of the said then present session of the said Parliament; and moreover, all other letters patent, within the space of one year then next following, to be made, by force, or according to the true purport or true meaning of a commission under the great seal of England, then in being, for the sale of the land, of the said late Queen, to any body politic, or corporate, or to any other person or persons whatsoever, of any honours, castles, manors, lordships, granaries, messuages, lands, tenements, meadows, pastures, rents, reversions, services, woods, advowsons nominations, patron-

[* 6 b.]

And further
plead the act
of confirma-
tion of letters
patent 43 Eliz.

[* 7 a.]

ages, annuities, rights, interests, entries, conditions, leases, courts, liberties, privileges, franchises, or of any *other hereditaments with the appurtenances, or of any part or parcel thereof, with or under the great seal of England, or under the seal of the duchy of Lancaster, or the seal of the county palatine of Lancaster, of whatsoever kind, nature, or quality, they or any of them are, or were reputed, known, or taken, with the appurtenances, or any part or parcel thereof, should be good, perfect, and effectual in law, and should stand, be taken, reputed, esteemed, and should be adjudged to be good; certain, perfect, available, and effectual in the law, against the said late Queen, her heirs and successors, according to the tenor and effect of the aforesaid letters patent and indentures, or other writings, and that the same should be expounded, construed, esteemed, and should be adjudged most beneficially for those, to whom the aforesaid letters patent, and grants thereof so are made, the heirs, assigns, executors, and administrators of them, according to the words and purport of the said letters patent, indentures, or other writings, without any confirmations, licences, or tolerations of the said late Queen, her heirs or successors, any ill naming, ill reciting, or not reciting, of the said honours, castles, manors, lands, tenements, or other the premises, or of any part or parcel thereof, or any defect in finding of office or inquisition, of and in the premises, or any part thereof, by which the title of the said late lady the Queen of and in the premises ought to be found, before the publishing of the aforesaid letters patent, indentures, or other writing, or any ill reciting, or not reciting, of demises thereof made, as well of record, as not of record, or any ill reciting, or not reciting, or not true mentioning in any such letters patent, grants, or writings of the estate or estates of the said late Queen, of freehold, or inheritance, of or in the premises, or any part thereof, to which the said late Queen, after the beginning of her reign was, or then after should be intitled, by any attainer, escheat, conveyance or assurance whatsoever; and in which letters patent, grants, or writings, no estate tail then before made, or supposed to be made was recited, or from henceforth should be, and the reversion or remainder thereof expectant, in the said letters patent, grants, or writings, granted or mentioned to be granted, or any defect of certainty, or ill computing, mistaking, rating, or setting forth of the yearly value or rate of the premises, or yearly rents reserved of and for the premises, or any parcel thereof mentioned or contained in the same letters patent aforesaid, or other writings, or for that the premises then were, or any part thereof, were then valued at a greater or lesser value, in the said letters patent, or writings, than the said manors, lands, tenements, and other premises then were, or were in yearly value, or any misnaming or not true *naming, of any town, hamlet, parish, or county where the said honours, manors, lands, tenements, rents, hereditaments, and other the premises, and every part thereof, or any parcel thereof lay, or were, or any defect of true naming of the lands, tenements, or heredita-

[* 7 b.]

ments, or any parcel thereof, or of the nature, kind, quality, or quantity, of the aforesaid possessions or hereditaments, or of any parcel thereof, or any default of true naming of any corporation, or any default of attornment, livery, or seisin, or any ill naming of any the late tenants of the aforesaid honours, manors, lands, tenements, and hereditaments, or of any part thereof, so sold, granted, or given, or any ill naming of any person or persons, bodies politic or corporate, who any time before the making of such letters patent, were, or then after should be proprietors of the premises, or any part thereof to the contrary notwithstanding; as by the said act, amongst other things, it more fully appeareth. And the said John Hele and Warwick further say, that the said late Queen Elizabeth never had any son; and that the aforesaid Gellio Merick, and Henry Lindley, were at and before the time of the making of the said letters patent, so as before is said made, subjects of the said late Queen Elizabeth, and born at Westminster aforesaid; all and singular which the said John Hele and Warwick are ready to aver; whereupon they demand judgment, if the said letters patent of the aforesaid late Queen Elizabeth, of the manors aforesaid with the appurtenances, so as before is said made, ought to be revoked and annulled, or the manors aforesaid, with the appurtenances, or any of them, ought to be seised into the hands of the lord the now King, &c. And the aforesaid Henry Hobart, Knt. Attorney General of the Lord the now King, who, &c. present in Court in his proper person, as to the aforesaid plea of the said Henry Lindley, above in form aforesaid pleaded, for the said lord the King saith, that the said Henry Lindley ought not to be admitted to plead, that there is not any such record of any such act of Parliament, of the aforesaid lord King Edward the Third made, as in the said writ of *Scire facias* is recited. Nor that there is not any such record of the aforesaid charter of the said late King Edward the Third, by authority of Parliament made, as in the aforesaid writ of *Scire facias* thereof is recited and specified. Because he saith, that the said lord King James, now King of England (*inspezit*) hath seen the inrolment of the aforesaid act of Parliament, of the said late King Edward the Third, as in the said *Scire fac* is also recited, in the Rolls of the Chancery of the now King, within his Tower of London, of the 11th year of the reign of the aforesaid late King Edward the Third inrolled, upon record there remaining. The tenor of the inrolment of *which act of Parliament, and charter aforesaid, the said James now King of England, by his letters patent under the great seal of England sealed, here in Court by the aforesaid Attorney General of the lord the now King, for the said lord the now King, now brings into Court, bearing date at Westminster aforesaid, the 5th day of March, in the year of the reign of the said lord the King that now is, of England, France, and Ireland, the 3d, and of Scotland the 39th, exemplified amongst other things, which exemplification, as to the inrolment of the aforesaid act of Parliament, and charter aforesaid followeth in these words. James by the grace of God of England, Scotland, France, and Ire-

Replication as to the plea of H. L. shows an exemplification by inquisition of the said charter, 11 Edw. 3. under the great seal.

[* 8 a.]

land, defender of the faith, &c. To all to whom these present letters shall come greeting ; We have seen the inolment of a certain charter, bearing date 17th day of March, in the 11th year of the reign of the lord Edward the Third, late King of England, to his well-beloved and faithful Edward Earl of Chester, his first begotten son granted, in the Rolls of our Chancery, within the Tower of London, remaining of record in these words. Edward by the grace of God, King of England, Lord of Ireland, and Duke of Aquitain, to the Archbishops, Bishops, Abbots, Priors, Earls, Barons, Justices, Sheriffs, Provosts, Ministers, and all Bailiffs, and his faithful people, greeting ; amongst other the ensigns of honour of our kingdom, we esteemed it the chiefest, that the order of dignities and offices of our kingdom be fortified with the best and strongest counsels ; therefore there being many degrees of honour of inheritance in our kingdom, where by descent the inheritance, according to the law of this kingdom, to coheirs and parceners, and for want of such issue and parceners and such like various events, the same came to our royal hands ; whereby our said kingdom hath long and many ways suffered a defect in names, dignities, and titles of honour ; we therefore desiring to beautify our kingdom, and in the best manner to defend our kingdom, and the holy church thereof, and our subjects and dominions against the endeavours of the enemies and adversaries thereof, and considering and desiring that peace between us and our subjects be inviolably maintained ; and to dignify the places of honour of our kingdom ; and taking into consideration the person of our well-beloved and faithful Edward Earl of Chester our eldest son, and intending to honour the same our son, with the name and honour of Duke of Cornwall, with the common consent and counsel of the Prelates, Earls, Barons, and others of our council in this our present Parliament at Westminster, upon Monday next after the feast of St. Matthew the Apostle last past, being assembled, we have given, and made him Duke of Cornwall, and girt him with a sword as behoveth ; and that there may be no doubt hereafter,

[* 8 b.]

what, or how *much the same Duke, or other Dukes of the same place, who for the time shall be, in the name of the said duchy ought to have : our will is, that all in specialty, which to the said duchy doth belong, be inserted in this our charter : therefore for us and our heirs, we have given and granted, and by this our charter confirmed, to the same our son under the name and honour of Duke of the said place, the castles, manors, lands, and tenements, and other things underwritten. That he the state and honour of the said Duke might uphold according to the nobility of his stock, and the charges and burthens thereof the better uphold, that is to say, the sheriffwick of the county of Cornwall, with the appurtenances, so as the said Duke, and other Dukes of the same place for the time being, make, constitute and appoint Sheriffs of the said county of Cornwall at their will and pleasures, and to do and execute the office of Sheriffs there, as heretofore it used to be done, without any hindrance of us, or our heirs for ever. As also

the castle, borough, manor and honour of Launceston, with the park there and other the appurtenances in the county of Cornwall, and Devonshire; the castle and manor of Tremeton, with the town of Saltash, and the park there, and other the appurtenances in the said county; the castle, borough and manor of Tintagel, with the appurtenances in the said county of Cornwall; the castle and manor of Restormel, with the park there, and other the appurtenances in the said county; and the manor of Clymestond, with the park of Keribullock, and other their appurtenances, Tibeste, with the bailiwick of Powdershire, and other their appurtenances, Tewynton, with the appurtenances, Helleston in Kerrier, with the appurtenances, Moresk, with the appurtenances, Tewernaile, with the appurtenances, Penkneth, with the appurtenances, Penlyn with the park there, and other the appurtenances, Rellaton, with the bedelry of Estwyncleshire, and other the appurtenances, Helleston in Tringshire, with the Park of Hellesbury, and other its appurtenances, Lyskirett, with the park there, and other the appurtenances, Calistock, with the fishing there, and other the appurtenances, and Talskid with the appurtenances, in the said county of Cornwall, and the town of Lestwithiell in the said county, with the mill there, and other the appurtenances; and the prisage and customs of our wines, in the said county of Cornwall, and also the profits of all the ports within the same our county of Cornwall, to us belonging, together with wreck of the sea, as well of whales and sturgeon, and other fishes which do belong to us, by reason of our prerogative, and whatsoever belongs to any wreck of the sea with the appurtenances, in our said county of Cornwall. And the profits and emoluments of our county court holden in our county of Cornwall, and hundreds and courts in the said county to us belonging; as also our stannary in the said county of *Cornwall, together with the coinage of the said stannary, and all issues and profits thereof arising; and also all the issues, profits and perquisites to the Court of Stannary, and the mines of the said county, (except only 1000 marks which to our well beloved and faithful Will. de Monte acuto, Earl of Salisbury, we have granted for us and our heirs, to be taken to him and the heirs males of his body lawfully begotten, of the issues and profits of the aforesaid coinage, until the castle and manor of Tonbridge, with the appurtenances in the county of Wilts, and the manors of Aldebourn, Ambresbury and Winterbourn, with the appurtenances in the said county, and the manor of Cane-ford with the appurtenances, in the county of Dorset, and the manor of Hengstrig and Charleton, with the appurtenances in the county of Somerset, which our beloved and faithful John de Warren, Earl of Surrey, and Joan his wife, hold, for the term of their lives, and which after their deaths to us and our heirs ought to return (but) after the decease of the said E. and Joan, to the aforesaid Earl of Salisbury, and the heirs males of his body lawfully begotten, to the value of 800 marks by the year, we granted, to remain; and 200 marks of land and rent, which to the said Earl of Salisbury to have in form aforesaid,

[* 9 a]

we granted (when the same came to our hands.) And also our stannary in the aforesaid county of Devon with the coinage, and all issues and profits of the same: and also the issues, profits, and perquisites of the said Court of Stannary, and the water of Dertmouth in the said county: and the yearly farm of 20*l*. of our city of Exeter, and the prize and customs of our wines, in the water of Sutton, in the said county of Devon; as also the castle of Wallingford, with its hamlets and members, and the yearly farm of the town of Wallingford, with the honours of Wallingford, and De Sancto Wallerico, with the appurtenances in the county of Oxford, and other counties wheresoever those honours were, and the castle, manor, and town of Berkhamstead, with the park there, together with the honour of Berkhamstead, in the counties of Hertford, Bucks, and Northampton, and other their appurtenances, and the manor of Bisset, with the park there, and other the appurtenances in the county of Surrey, to have and to hold to the said Duke, and of him, and his heirs, Kings of England, eldest sons, and Dukes of the said place in the kingdom of England, by inheritance to succeed, together with the knights' fees, advowsons of churches, abbies, priories, hospitals, chapels, and with the hundreds, fishings, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villains, and all other things to the aforesaid castles, boroughs, towns, manors, honours, stannaries, and coinage, lands and tenements howsoever and whatsoever* belonging or appertaining, of us and our heirs for ever, together with 24*l*. of yearly farm, which our well beloved and faithful John de Meere, to us by the year, for all his life is bound to pay for the castle and manor of Meere, with the appurtenances in the county of Wilts, granted to him by us for the term of his life, to be taken every year by the hands of the said John, for the term of his life, and with the aforesaid 1000 marks yearly, to the aforesaid Earl of Surrey, of the issues of the coinage aforesaid, by us so granted, after obtained by him, or his heirs males of his body to be begotten, seisin of the said castle and manor of Tunbridge, and the manors of Aldehourn, Ambresbury, Winterbourn, Cane-ford, Hengstrigg and Charleton, after the deaths of the same Earl of Surry, and Joan; and the said 200 marks, land and rent to the said Earl of Salisbury, and the heirs males of his body begotten, so to be provided, for the proportions of the said castles, manors, lands, and tenements, with the whole, or particulars which to the hands of the said Earl of Salisbury, and the heirs males of his body should come: we have moreover granted, for us and our heirs, and by this our charter we have confirmed, that the castle and manor of Knaresburgh, with the hamlets and members thereof, and the honour of Knaresburgh, in the county of York, and other counties wheresoever the same honour should be; the manor of Isleworth, with the appurtenances in the county of Middlesex, which Philippa Queen of England our most dear consort holdeth for term of life; and the castle and manor of Lydesford with the appurtenances, and with the chace of Dertmore with

[* 9 b.]

the appurtenances in the said county of Devon, and the manor of Bradeneshe with the appurtenances in the said county, which our beloved and faithful Hugh de Audley, Earl of Gloucester, and Margaret his wife, have for the life of the said Margaret; and the said castle and manor of Meere with the appurtenances; which the aforesaid Joan so for life holdeth by our grant, and which after the death of the said Queen Margaret and Joan, to us and our heirs ought to revert, after the decease of the aforesaid Queen aforesaid, that is to say, the castle and manor of Knaresburgh, with the honours, hamlets, and members thereof aforesaid, and other their appurtenances, and the manor of Isleworth with the appurtenances; and after the death of the said Margaret, the said castle and manor of Lydeford, with the said Chace of Dertmore, and other the appurtenances, and the manor of Bradeneshe with the appurtenances; and after the death of the said Joan, the said castle and manor of Meere with the appurtenances, shall remain to the aforesaid Duke, and of him and his heirs, Kings of England, eldest sons, and Dukes of the said place, in the kingdom of England, hereditarily to succeed, as before is said, to have and to hold, together with the said knights' fees*, advowsons of churches, abbies, [* 10 a.] priories, hospitals, chapels, and with hundreds, wapentakes, fishings, forests, chaces, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, services of tenants, as well free as villains, and all other things to the same castles, manors, and honours, howsoever and wheresoever belonging or appertaining, of us likewise, and our heirs for ever; all which castles, boroughs, towns, manors, honours, stannaries, coinage, farms of Exeter and Wallingford, lands and tenements, as above are specified, together with the fees, advowsons, and all other things aforesaid, to the aforesaid duchy by our present charter, for us and our heirs, we do annex and unite to the same for ever to remain; so that from the said duchy, at no time they be any ways severed, nor to any one other than Dukes of the same place, by us, or our heirs they be given, or any manner of way granted; so also as that of the aforesaid Duke, and other Dukes of the same place they do descend, and to the son or sons, to whom the said duchy, by colour of our grant aforesaid it shall belong, then not appearing, the said duchy, with the castles, boroughs, towns, and all other the abovesaid, to us or our heirs, Kings of England, shall return in our hands; and in the hands of our heirs Kings of England, to be kept until such son or sons, of the said kingdom of England hereditably to succeed shall appear, as it is said, to whom, then successively the said duchy with the appurtenances, for us and our heirs, we grant, and will, that they be delivered, to hold, as above is expressed. We have moreover, for us and our heirs, and by this our charter we have confirmed to the aforesaid Duke, that the said Duke, and the heirs of him, eldest sons, Dukes of the same place for ever, have free warren in all the lordships, manors, castles, lands, and other places aforesaid, so as the said lands be not within the bounds of our forests; and that none enter into them, to

[* 10 b.]

hunt in them, or to take any thing which to warren appertaineth, without the licence and will of the said Duke, or other Dukes of the same place, upon pain of forfeiture of 10*l.* wherefore we will and firmly command, for us and our heirs, that the said Duke have and hold to him and his heirs, eldest sons of the Kings of England, and Dukes of the said place, in the said kingdom of England, inheritably to succeed, the aforesaid sherriffalty of the aforesaid county of Cornwall with the appurtenances; so that they, and others, Dukes aforesaid, at their wills make and constitute the Sheriff aforesaid, of the said county of Cornwall, to do and execute the office of Sheriff there, as hitherto is used to be done, without the hinderance of us, or our heirs for ever; as also the aforesaid castles, boroughs, manors, and honours of Launceston, the castle and manor of Tremeton, with the town of Saltash,* the castle, borough, and manor of Tintagel, the castle and manor of Restormel, and the manors of Clymeslond, Tibeste, Tewynton, Helleston in Kerier, Moresk, Tewarnaile, Pengkneth, Penkyn, Rellaton, Helleston in Tringshire, Lyskirett, Calistock, Tal-skid, and town of Lestwithiel, with the appurtenances, together with the parks, bailiwicks, bedelry, fishings, and other things abovesaid, in the aforesaid county of Cornwall, and the aforesaid prisages, customs, and profits of ports aforesaid, together with the said wreck of sea, and the said profits and emoluments with the hundreds and courts aforesaid to us belonging, and the said stannary in the said county of Cornwall, together with the coinage of the said stannary, and with all issues and profits thereof arising, and also the explees, profits, and perquisites of the courts aforesaid (except only the said 1000 marks, which to our well beloved and faithful William de Monte acuto, Earl of Salisbury, we granted for us and our heirs, to be taken to him, and the heirs males of his body lawfully begotten) of the issues and profits of the coinage aforesaid, until the said castle and manor of Tunbridge with the appurtenances, and the said manors of Aldebourn, Ambresbury, and Winterbourn, with the appurtenances, and the said manor of Hengstrig and Charlton with the appurtenances, which the aforesaid Earl of Surrey, and Joan his wife, hold for the term of their lives, and which after their deaths, to us and our heirs, ought to revert, after the deceases of the said Earl and Joan, to the said Earl of Salisbury, and the heirs males of his body lawfully begotten, to the value of 800 marks by the year we have granted to remain; and the said 200 marks, land and rent, which to the said Earl of Salisbury, to have in form aforesaid we granted, come unto our hand (as before is said) and the said stannary in the county of Devon, with the coinage, and all issues and profits thereof; and also the explees, profits, and perquisites of the court of the same stannary, water of Dertmouth, and the said yearly farm of 20*l.* of the said city of Exeter, and the said prisage and custom of wines, in the water of Sutton, in the said county of Devon; as also the aforesaid castle of Wallingford, with the hamlets and members thereof, the yearly farm of the town of Wallingford, with the said honour of Wallingford, and De

Sancto Walerico, the castle, manor, and town of Berkhamstead, with the said honour of Berkhamstead, and the manor of Bisset, with the parks and other their appurtenances aforesaid, together with knights' fees, advowsons of churches, abbies, priories, hospitals, chapels, and with the hundreds, fishings, forests, chaces, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villains, and all other things to the said castles, boroughs, towns, manors, stannaries, and coinage, lands and tenements whatsoever* and wheresoever, belonging or appertaining, of us and our heirs for ever, together with the said 247. farm, which the aforesaid John de Meere, to us yearly, for his whole life is bound to pay, for the said castle and manor of Meere, granted to him by us, to hold for the term of his life, to be taken yearly by the hands of the said John de Meere all his life; and also with the aforesaid 1000 annual marks, to the aforesaid Earl of Salisbury, of the profits of the coinage aforesaid, by us so granted, after *shall be* obtained by him, or the heirs males of his body begotten, seisin of the aforesaid manor of Tunbridge, and manors of Aldebourn, Ambresbury, Winterbourn, Caneford, Hengstrig and Charlton, after the decease of the said Earl of Surrey and Joan; and the said 200 marks of land and rent to the said Earl of Salisbury, and the said heirs males of his body so provided, for the like proportion of the said castles, manors, lands, and tenements, with the whole, and particulars, when to the hands of the said Earl of Salisbury, or the heirs males of his body lawfully begotten, should come as aforesaid: and that the aforesaid castle and manor of Knaresburgh, with its hamlets and members, and the honour of Knaresburgh, and the manor of Isleworth with the appurtenances, after the death of our aforesaid consort, the castle and manor of Lydeford with the appurtenances, and with the said chase of Dertmore with the appurtenances, and the manor of Bradnesh, with the appurtenances, after the decease of the aforesaid Margaret, and the castle and manor of Meere with the appurtenances, after the death of the aforesaid John de Meere, shall remain to the said Duke, to have and to hold to him and his heirs, eldest sons of the Kings of England, and Dukes of the same place in the kingdom by inheritance to succeed, together with knights' fees, advowsons of churches, abbies, priories, hospitals, chapels, and with hundreds, wapentakes, fishings, forests, chaces, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villains, and all other things to the said castles, manors, and honours, howsoever and wheresoever belonging or appertaining, (to hold) of us likewise, and our heirs for ever, as before is said; all which castles, boroughs, towns, manors, and honours, stannaries, and coinage farms of Exeter and Wallingford, lands and tenements, as above are specified, together with the knights' fees, advowsons and all other things above said, to the said duchy by this our present charter, for us and our heirs, we do annex and unite, to the same to remain for ever; so as from the said duchy, at

[* 11 a.]

[* 11 b.]

no time hereafter they be severed, nor to any person or persons than the Dukes of the same place, by us or our heirs they be given, or in any ways granted : so that to the aforesaid Duke, or other Dukes of the same place they do descend, and the son * or sons, to whom the said duchy, by colour of the aforesaid our grants it behoves to belong then not appearing, the same duchy with the castles, boroughs, towns, and all other things aforesaid, to us, and our heirs Kings of England shall revert, in our hands, and in the hands of our heirs to be kept, until such son or sons, in the said kingdom of England hereditably to succeed shall appear, as before is said, to whom successively the said duchy with the appurtenances, for us and our heirs we grant, and will to be delivered, to be holden as above is expressed. And that the said Duke and his heirs, eldest sons, Dukes of the said place for ever, have free warren in all the demesnes of the lands aforesaid, so that the same lands are not within the bounds of our forests ; so as none enter into those lands to hunt in them, or to take any thing which to warren belongeth, without the licence and will of the said Duke, and the other Dukes of the said place, upon pain of forfeiture of 10*l.* as before is said ; these being witnesses, the most Rev. father John Archbishop of Canterbury, Primate of all England, our Chancellor, Henry Bishop of Lincoln our Treasurer, Richard Bishop of Durham, John de Warren Earl of Surrey, Thomas de Bello Campo Earl of Warwick, Tho. Wake of Lydell, and John de Mowbray, John Darcy le Neuen steward of our house, and others, given by our hands at Westminster, the 17th day of March, in the 11th year of our reign, by the King himself, and *whole council in Parliament*. But we, the tenor of the charter, record, and act of Parliament aforesaid, at the request of our well-beloved and faithful Tho. Stephens, Esq. Attorney General of our well-beloved and most dear son, our eldest son Henry, Prince and Duke of Cornwall, caused to be exemplified by these presents. In witness whereof we have caused these our letters to be made patent. Witness myself at Westminster the 5th day of March, in the year of our reign of England, France, and Ireland the third, and of Scotland the 39th, as by the said letters patent of exemplification aforesaid here into court brought more fully appeareth. And the said Henry Hobart Attorney-General of the said lord the now King, for the said lord the now King saith, and will aver, that the aforesaid act of Parliament aforesaid, of the aforesaid late King Edw. 3. made, and the aforesaid charter, by the aforesaid late King Edw. 3. by authority aforesaid, of the parliament of the same late King Edw. 3. by authority of Parliament aforesaid made, whereof is the enrolment aforesaid, and in the aforesaid exemplification of the enrolment aforesaid, as before is said, is made mention, are one and the same, and not other nor divers : whereupon the said Attorney-General of the said lord the now King, for the said lord the King here demandeth judgment, if the aforesaid Henry Lindley, to say, that there is not any such record of such act of Parliament aforesaid*, of the aforesaid late King Edward 3. nor any such record of the aforesaid charter, by

And demands
judgment if
against the
same H. L.
shall be admit-
[* 12 a.]
ted to plead
nul tiel record.

the said late King Edw. 3. by authority of the Parliament aforesaid, in the writ aforesaid of *Scire facias* specified, against the said letters patent of exemplification aforesaid, here into court, by the said Attorney of the aforesaid lord the now King, for the said lord the now King shewed forth, ought to be admitted. And further. the said Henry Hobart, the Attorney General of the said lord the now King, for the said lord the King prayeth that the said letters patent of the aforesaid late Q. Eliz. as unto the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances, be revoked and annulled; and that the aforesaid manors of West Taunton, Trelowia, and Landalph with the appurtenances, into the hands of the said lord the now King be taken and seised: and the aforesaid Henry Hobart, Knt. Attorney General of the said lord the now King, who, &c. As to the said plea of the aforesaid John Hele and Warwick Hele, by them above in form aforesaid pleaded, for the said lord the King saith, that that plea, and the matter therein contained, is not sufficient in law to maintain, that the aforesaid letters patent of the aforesaid late Q. Eliz. of the aforesaid manors of West Taunton, Trelowia, and Landalph, ought not to be revoked and annulled, or that the manor aforesaid with the appurtenances, into the hands of the said lord the now King, ought not to be seised. To which plea in manner and form aforesaid pleaded, the said Attorney General for the said lord the King needeth not, by the law of the land is bound to answer, and this he is ready to aver: wherefore for want of a sufficient plea of the said John Hele and Warwick Hele in this behalf, the said Attorney General for the said lord the King demandeth judgment, that the said letters patent of the aforesaid late Q. Eliz. of the aforesaid manors of West Taunton, Trelowia, and Landalph with the appurtenances made, be revoked and annulled, and the manors aforesaid with the appurtenances, be taken and seised into the hands of the lord the King, &c. Upon which the aforesaid Henry Lindley saith, that the plea of the aforesaid Attorney General, for the said lord the now King, to the plea of the said Henry Lindley, above by replication pleaded, and the matters therein contained, are not sufficient to bar him the said Henry Lindley, to say, that there is not any such record of such act of parliament, of the aforesaid late King Edw. 3. made, as in the aforesaid writ of *Scire facias* thereof is recited and specified, nor that there is any such record of the aforesaid charter, by the said late King Edw. 3. by authority of the Parliament aforesaid made, as in the aforesaid writ of *Scire facias* thereof is above recited and specified. And that the said Henry Lindley, to that plea in manner aforesaid by replication pleaded, needeth not, nor by the law of the land* is bound to rejoin, and this he is ready to aver; wherefore for want of a sufficient replication in his behalf, the said Henry Lindley as at first demandeth judgment, if the aforesaid letters patent of the aforesaid late Q. Eliz. of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances made, ought to be annulled, or the aforesaid manors of West

As to the plea of J. H. and W. H. the Attorney General demurs.

H. L. demurs to the replication of the Attorney-General.

[* 12 b.]

J. H. & W. H.
join in de-
murrer.

And farther as
amici curiæ
and to inform
the Court of
the truth and
of the state,
which the King
that now is,
has in the residue
of the said
manors, parcel
of the said
manor, they
repeat to the
Court part of
the said act
1, H. 7. concerning
the said duchy of
Cornwall.

[* 13 a.]

Taunton, Trelowia, and Landalph, with the appurtenances, or any of them, ought to be taken and seised into the hands of the lord the now King. And the aforesaid John Hele and Warwick Hele for themselves say, that inasmuch as they sufficient matter in their plea aforesaid, by them above pleaded, have alleged, that is to say, the aforesaid seisin of the aforesaid late Q. Elizabeth of the aforesaid manors of West Taunton, Trelowia, and Landalph with the appurtenances in her demesne as of fee, in the right of her crown of England, and the grant aforesaid, by the aforesaid letters patent of the said late Queen, and the rest of the matters by them above pleaded, which the aforesaid John Hele and Warwick Hele are ready to aver, which matter the aforesaid Attorney General of the lord the now King, doth not deny, nor to the same any ways answereth, but the same averment to admit altogether refuseth, as at first demands judgment, if the aforesaid letters patent of the aforesaid late Q. Eliz. of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances made, ought to be revoked or annulled, or the said manors with the appurtenances, or any of them, into the hands of the said lord the now King, ought to be taken or seised. And farther, for the better information, and more fully to inform the said lord the now King, and the court here, of the state of the lord the now King, to the aforesaid duchy of Cornwall, and to other manors to the said late duchy any manner of way belonging or annexed, or any part or parcel thereof, the said John and Warwick say, that in the statute in Parliament of the Lord Henry late King of England the 7th, held at Westminster in the county of Middlesex, the 7th day of November, in the first year of his reign made, amongst other things ordained, it was enacted and established by authority of Parliament, that the said lord King Her. 7. should have, hold, enjoy, and possess, to him and his heirs for ever, from the 21st day of August then last past, the aforesaid duchy of Cornwall, and all and singular the honours, castles, lordships, manors, lands, tenements, rents, reversions, services, possessions, advowsons, and other hereditaments, with all and singular their members, and appurtenances, to the aforesaid duchy belonging and appertaining, or which were belonging, annexed, reputed, or taken, parcel of the same, any time of the reigns of Hen. 6. and Edw. 4, late Kings of England, in as ample and large manner, with all liberties, franchises, and other things to the same* belonging, in like manner, form, and condition as the aforesaid Kings, or either of them had, held, occupied, used, or enjoyed, or had held, occupied, used and enjoyed in the same, in any time during the said Kings' reigns, as in the statute aforesaid, in the first year of the reign of the aforesaid late King Hen. 7. above-said, amongst other things it is more fully contained, and appeareth: by which the said King James, now King, was and yet is seised of the rest of the manors, lands, and tenements, to the aforesaid duchy of Cornwall belonging, by the aforesaid late Q. Eliz. not aliened, in his demesne as of fee, in the right of his crown of England, whereupon they pray that the court here

take knowledge and notice of the aforesaid statute in the first year of the aforesaid late King H. 7. as abovesaid made, and of the aforesaid statute of the lord the now King, to the aforesaid duchy of Cornwall belonging, they would take, accept, &c. And the aforesaid Hen. Hobart, Attorney General of the aforesaid lord the now King, who, &c. as to that, whereupon the aforesaid Henry Lindley above demurreth in law, inasmuch as he sufficient matter in law for the said lord the King to bar the aforesaid Hen. Lindley from saying, that there is not any such record of any such act of Parliament, of the aforesaid late King Edw. 3. made, nor any such record of the aforesaid charter by the said late King Edw. 3. by authority of Parliament aforesaid, made, as in the aforesaid writ of *Scire facias* thereof it is recited and specified, above alleged, which matter the aforesaid Hen. Lindley doth not deny, nor to the same any ways answereth, but that averment to admit utterly refuseth, the said Attorney General of the said lord the now King, for the said lord the King demandeth judgment, and that the aforesaid letters patent of the aforesaid late Q. Eliz. of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances made, be revoked and annulled; and that the said manors with the appurtenances into the hands of the said lord the now King be taken and seised, &c. And because the court of the said lord the now King here, will advise of and upon the premises, before it proceeded to judgment thereof, day is given as well to the aforesaid Henry Hobart, Knt. Attorney General of the said lord the now King who, &c. as to the aforesaid Hen. Lindley, John Hele, and Warwick Hele, before the said lord the now King in the said court here, until in eight days of St. Hilary next, &c. wheresoever, &c. to hear their judgment thereof, because the said court here thereof are not yet, &c. At which day of eight days of St. Hil. that is to say, at Westminster aforesaid, come as well the aforesaid Hen. Hobart, Knt. Attorney General of the said lord the now King, who, &c. in his proper person, as the aforesaid Hen. Lindley, John Hele, and Warwick Hele, by their attorney aforesaid; and upon this the Attorney General of the lord* the King, as at first demandeth judgment, and that the aforesaid letters patent, of the aforesaid manors of West Taunton, Trelowia, and Landalph, with the appurtenances in form aforesaid made, be revoked and annulled, and that the said manors with the appurtenances into the hands of the said lord the now King, be taken and seised, &c. And because the said court of the lord the now King, here, will farther advise before that it proceed to judgment thereof, day farther is given as well to the aforesaid Henry Hobart, Knt. Attorney General of the said lord the King, who, &c. as to the aforesaid Henry Lindley, John Hele, and Warwick Hele, here until in 15 days of Easter next, &c. wheresoever, &c. to hear their judgment thereof, because the said court of the said lord the now King here, thereof are not yet, &c.

The Attorney General joins in demurrer with H. L.

Curia advisare vult.

[* 13 b.]

Curia ulterius advisare vult.

See the form of the judgment hereupon at the end of the case, viz. fol. 30 b.

THE PRINCE'S CASE.

- Resolved,—1. The instrument made 11 E. 3. to Prince Edward, by which the Prince was created Duke of Cornwall and the possessions of the dukedom of Cornwall given to him, with special limitations, and the possessions annexed to the said duchy so as they shall not be severed, with a special clause of revivification if the special limitations at any time should cease, &c. is a charter made by authority of Parliament.
- *Note differences touching letters patent which pass by bill signed without privy seal; those which pass by bill signed and by privy seal also, and those made by authority of Parliament.*
- *There are many examples of acts of Parliament in the form of the King's charter.*
- *The words (by authority of Parliament) in an act or charter are sufficient to make it an act of Parliament.*
- *An act of Parliament penned by assent of the King and of the Lords Spiritual and Temporal and of the Commons, is a good act. But an act penned that the King with the assent of the Lords, or that the King with the assent of the Commons, is no act of Parliament.*
2. The Charter having the authority and force of Parliament is sufficient in itself without any other act; and if the King's *Scire facias* hath sufficient matter, it shall never abate, for surplusage not material.
3. The Prince hath an estate in fee simple in the dukedoms.
- *The inheritor of which estate ought to be the first begotten son of the heirs of the Black Prince.*
4. Nul tiel record cannot be pleaded against a general act of Parliament. But if it be misrecited, the party ought to demur.
- This act is such an act whereof the judges and all the kingdom ought to take notice.
- *If the Prince, as Prince of Wales, has judgment to recover, and afterwards the Crown descends to him, he, as King, shall sue execution.*
- The act by 3 Eliz. of confirmation of letters patent supplies only particular defects as misnomer of the manors, &c. misrecital, &c. and makes the letters patent good only against the King, his heirs and successors, with a saving to all others.
- In *Scire facias* brought upon petition of the Prince, Duke of Cornwall, to repeal letters patent made of any parcel of the said duchy, that the King may make livery to the Prince,—the King or the Prince may reply to any bar pleaded by the defendants; but the better form is that the King's attorney, till livery be made, should reply.
- *The son and heir apparent of the King, if he is not the first begotten son, is not within the limitation in the instrument 11 Edw. 3.*

DOMINUS Rex, ad petitionem illustrissimi Principis Henrici, filii sui primogeniti, Ducis Cornubiæ, prosecutus est breve de Scire facias versus Henricum Lindley militem et Johannem Hele Servientem ad Legem, ad revocandum literas patentes nuper Regina Elizabethæ, datas secundo die Maii anno regni sui tricesimo septimo (per quas dicta Regina concessit dicto Henrico Lindley et cuidam Gellio Mericke, (jam defuncto) et hæredibus suis maneria, de West Taunton, Trelowia, et Landalph in com' Cornub') ut eadem maner' præf. Duci tanquam membra et parcelas ducatus prædicti liberari faceret: et hoc vigore 3. statutorum Parliamentariorum, scilicet duorum anno undecimo Edwardi tertii editorum; (quorum unum habet formam chartæ autoritate Parliamenti factæ, per quod Princeps in ducem Cornubiæ præfectus fuit, ejusdemque ducatus possessiones illi datæ cum speciali limitatione, et sic ducatus antedicto annexæ quod ab eo separari minime possunt: idque cum speciali clausula revivificationis, licet quandoque specialis illa cessaret limitatio, etc.) Tertii vero statuti anno 32 Hen. 8. per quod dicta illa maneria deveniunt parcell' ducatus Cornubiæ in perpetuum ad omnia proposita et intentiones, &c. Vicecomes returnat dictos H. Lindley, et Joh. Hele, et quendam W. Hele mil', terr'-tenentes prædict' trium maner', esse summonitos. Et post quatuor ad interloquendum dies datos, Hen. Lindley, quoad præd' duo Parl' statuta, an. 11 E. 3. separat' placit', quod nullum

***THE** King, at the petition of the most noble Prince Henry, his first begotten son, Duke of Cornwall, brought a (a) Scire facias against Henry Lindley, Knt. and J. Hele, Serjeant at Law, to repeal letters patent of the late Queen Elizabeth, bearing date the 2d of May, in the 37th year of her reign, by which the Queen granted to the said H. Lindley, and to one Gelly Mericke (now dead) and their heirs, the manors of West Taunton, Trelowia, and Landalph, in the county of Cornwall, to the end the King might make livery of them to the said Duke, as members* and parts of the duchy aforesaid, and that by force of three acts of Parliament, two in 11 E. 3. whereof the one is in form of a charter by authority of Parliament, by which the Prince was created Duke of Cornwall, and the possessions of the dukedom of Cornwall thereby given to him, with special limitation, and the possessions, annexed to the said duchy, so as they shall not be severed, with a special clause, of revivification, altho' the special limitation at any time should cease, &c. and of the act of 32 H. 8. by which the three manors are made parcels of the duchy of Cornwall for ever to all intents and purposes, &c. the Sheriff returned Sir Henry Lindley, and Serjeant Hele and one Warwick Hele, Knt. terre-tenants of the said three manors summoned; and after four imparlances, Sir Henry Lindley, as to the said two several acts of Parliament, anno 11 E. 3. severally pleaded Nul tiel record: Serjeant Hele and the said Warwick pleaded the

[* 14 a.]

(a) 1 Roll. 192.
2 Saund. 720.
10 Mod. 260.

[* 14 b.]

[* 15 a.]

Aute 8.
Palma. 92.

and letters patent of Queen Elizabeth with a *non obstante* the said act of 32 Hen. 8. and conveyed to themselves a joint estate, to them, and to the heirs of the said Serjeant; and further pleaded the act of confirmation of letters* patent at the Parliament held 43 Eliz. And as to the pleas of Sir Henry Lindley, the King's Attorney replied and shewed an exemplification by Inspeximus of the said charter of 11 E. 3. under the great seal, (as in the record where it is entered in hæc verba) and demanded judgment if against the same he should be admitted to plead nul tiel record. And demurred in law upon the plea of Serjeant Hele and Warwick, who joined with him. And further, ut amici curiæ, and to inform the Court of the truth, and of the state which the King that now is, hath in the residue of the said manors, parcel of the said duchy, they repeated to the Court part of the act of 1 H. 7. concerning the said duchy of Cornwall. And H. Lindley demurred in law upon the replication of the Attorney-general, with whom the attorney joined.

Four points.

The reason why I have made an abstract of the case, so compendious, is because I have added the whole record at length, and if the case should also be put at large, it would extend, as this case is, to an unnecessary prolixity. In this case four questions were moved being thought worthy of consideration. 1. If the instrument made 17 Mar. an' 11 E. 3. to Prince Edward be a charter made in time of Parliament, or a charter established by authority of Parliament, and this

tale hab' record': J. Hele, et Warw' anted' respond' allegant dict' Reg' Eliz. liter' patent' cum claus. de Non obst' præd' stat' de anno 32 H. 8. ostend' seipos conjunct' esse feoffat' ad solum suum propr' usum, et hæc' ejusd' J. Hele: actum insuper allegant confirmationis literarium patentium ad Parliament' anno 43 Reginæ Eliz. edit'. Et quoad placita Hen. Lindley, Attorn' Reg' replicandodie, et profert (per inspeximus) dict' chartæ de an' 11 E. 3. exemplificationem sub magno Angliæ sigil' prout in recordo, i. Actis publicis, ubi intratur, in hæc verba: et pet' jud', si, contra hanc exemplificat', ad dicendum, nullum tale record', admitti debeat. Et super placito dicti J. Hele et Warw. dict' att' moratur in lege: et illi scil. dicti Joh. et Warw' similiter. Et ulter', ut amici cur', ad informand' cur' de verit' et de statu Regis in residuo dict' maner' parcell' dicti ducat', repet' cur' partem statuti anno 1 H. 7. editi de antedict' Duc' Cornub'. Et super replicatione Attornati-generalis dict' Henr' Lindley moratur in lege: et ille, scilicet dict' attorn', sil'ter.

Rei, hoc tantummodo compend' retuli, eo, quod latius totam ex record' adjeci: et si casum etiam fusius dicere, prolixa nimis (ut casus hic se habet) hæc esset relatio. In hac causa 4 motæ fuerunt quæst' considerat' dignæ. 1. Si instrum' fact' 17 die Martii, an' 11 E. 3. Principi Edw' sit charta tempore Parliamenti fact' vel charta auctoritate Parliamenti stabilita. Et sum' totius litis in hoc articulo constituta est. 2. Si præter dictam chartam

aliquod fuerit aliud statutum Parliam': et si non sit, cujus denique valoris sit breve dom' Reg', in quo alterius mentio est stat'. 3. Si admittatur Principem fuisse Duc' Cornub', quem habet Princeps statum in dicto honore et ducatu Cornub'; et quoniam habet modo, scil' per descensum, vel per acquisitionem: si enim Princeps habeat solummodo particul' stat', tunc post particul' statum finitum dict' Jo. Hele, et hæred' sui haber' maner' præd' quousque, &c. et tunc judicium debet esse speciale cum Quoad, &c. et non generale, quod irrita sint dict' liter' patent', et eorundem irrotulament' cancelletur. 4. Si contra tale Parliamenti statutum nulum tale record' possit allegari. Et Domin' Cancellarius in re tanta tantique momenti, e singulis Westmonaster' tribus curiis unum sibi associavit Judicem, scil. Coke Capitalem Justiciarium de Banco, Fleming Capitalem Scaccarii Baronem, et Williams unum Justiciariorum ad Placita, coram domino Rege tenenda assignatum (dominus enim Joh' Popham miles nuper Capitalis Justiciarius, qui huc evocatus fuit, et argumentorum nonnulla ad barram audiverat, diem clausit extremum pendente placito.) Et hæc causa scite ad barram argumentata fuit per Stephens, Princ' Attor' pro Rege, et per Heron Servient' ad Legem pro defendant'; et secunda vice per Dodderidge Solicitatorem Regis Generalem, et per Houghton Servientem ad Legem pro defendantibus; et deinde per Hobart Generalem Regis At-

is the principal and fundamental point on which the whole depends.* 2. If there was [* 15 b.] any other act of Parliament but the said charter; and if there is no other act, if the King's writ be good which alleges another act. 3. Admitting the Prince to be Duke of Cornwall, what estate has the Prince in the honour and dukedom of Cornwall? and how has he it? by descent or by purchase? For if the Prince has but a particular estate, then, after the particular estate ended, the said Serjeant Hele and his heirs shall have the said manors until, &c. And then a special judgment ought to be given, with a Quoad, &c. and no general judgment that the letters patent shall be void, nor the inrolment cancelled. 4. If against such act of Parliament Nul tiel record may be pleaded. And the Lord Chancellor, because the cause was of great importance and consequence, assisted himself with a Judge of each of the Courts at Westminster, scilicet, Coke, Chief Justice of the Common Pleas, Fleming, Chief Baron of the Exchequer, and Williams one of the Judges of the King's Bench, (for Sir John Popham, Knight, late Chief Justice of the King's Bench, who was called to it, and heard some of the arguments* at the bar, died pendente placito.) [* 16 a.] And this case was argued very well at the bar, by Stephens the Prince's Attorney (A), for the King, and by Heron Serjeant for the defendants; and at another day by Dodderidge

(A) Vid. *Attorney General v. St. Aubyn and Others*, Wightw. 167. that the Prince of Wales may file an English information of intrusion by his *Attorney-General*, for lands parcel of the Duchy of Cornwall; and vid. the arguments in that case.

First point.
Co. Lit. 81 a.
98 b.

1. The charter
11 E. 3. was
made by au-
thority of
Parliament.

(a) 1 Jon. 104.

3 Madd. 526.
10 Mod. 412.
4 Mod. 213.

[* 16 b.]

(b) Jenk. Cent.
Raym. 355.

the King's Solicitor, and by Houghton Serjeant for the defendants; and, lastly, by Hobbart the King's Attorney General. And afterwards, the same term, the case was argued by Williams and the Chief Baron in one day; and at another by the Chief Justice of the Common Pleas and the Lord Chancellor. And as to the first point, it was unanimously resolved by the Lord Chancellor and the said Justices, that the said charter was made by (a) authority of Parliament. And because duo sunt instrumenta ad omnes res aut confirmandas, aut impugnandas, ratio et autoritas; they confirmed their opinions, 1. by reason, and then by authorities in law. For the first they gave two reasons, ex visceribus causæ: 1. Ex impossibili, and that for three causes: 1. It would be impossible if the said charter was not established by Parliament, that the estate, either of the honour to be Duke of Cornwall, or of the possessions thereof being limited in such special manner as it is, should be sufficient in law. For the limitation of both* is, (b) habendu et tenendum eidem Duci, et ipsius et hæredum suorum Regum Angliæ filiis primogenitis et dicti loci Ducibus, in regno Angliæ hæreditarie successuris. So that he who ought to inherit by force of this grant, ought to be the first begotten son and heir apparent of the King of England, and of such King as is heir to Prince Edward, and that such first begotten son and heir apparent to the crown shall inherit the said dukedom in the lifetime of the King his father. So that if there be King, grand-

tornatum: et postea isto eodem termino causa hæc per Williams et Capitaletm Baronem prima vice disceptata fuit; et per Capitaletm Justiciarium de Banco et Dominum Cancellar' vice secunda. Et quoad articulum primum, uno assensu determinatum fuit per Cancellarium et dictos Justiciarios, quod dicta charta facta fuit autoritate Parliamenti. Et quoniam duo sunt instrumenta ad omnes res aut confirmandas, aut impugnandas, ratio et autoritas; suas firmarunt opiniones, 1. Ratione, 2. Ex legis autoritate. Quoad primum duas afferunt rationes ex visceribus causæ, primam ex impossibili; et hoc tribus de causis. 1. Impossibile foret, si dicta charta non fuerit Parlamento stabilita, statum, vel honoris præf. in Duc' Cornub', vel posses. ind', isto special' modo limitatarum quo hæ sunt, fore sufficient' in lege; ambor' enim limitatio est. Habendum et tenendum eidem Duci, et ipsius et hæredum suorum Regum Angliæ filiis primogenitis et dicti loci Ducibus, in regno Angliæ hæreditarie successuris. Ita quod hunc, qui hæreditare debet virtute hujus concessionis, oportet esse filium primogenitum et hæredem apparentem Regis Angliæ, immo hujusmodi Regis qui hæres est dict' Principi Edwardo; et quod primogenitus ille filius et hæres coronæ apparens jure hæreditario haberet dictum Ducat', vivente Rege suo patriæ: utputa sit Rex avus, pater, et filius, hic pater (primogenitus existens filius avi) est Dux Cornubiæ vivente Rege; et eo instante quo avus decedit pater est Rex, et eo etiam instante filius est Dux Cornub', qui hæred' ordo,

cum sit contra regulas legis communis, creari non potest charta, stat' Parliament' virt' et vigore non adhibitis. Et in hoc casu filius Rēgis natu maximus hanc habet dignitatem jure et hæred,' eodem modo quo filii natu maximi primatum et procerum regni (quorum supereminentes sunt dignitates) habent appellat' et urbanitate tant'; utputa sit avus Baro, pater, et filius, et Rex avum creat' in comit', eo instante pater est Baro appellat' et urbanitate, et eo etiam instante quo avus decedit, pater est Comes et filius Baro urbanitate: et sic de similibus. 2. Impossibile foret possessiones ducatus sic esse annexæ dicta charta, eodem modo prout charta in se exigit; clausula enim connexionis est; quæ quidem omnia castra, burg', vill', maneria, &c. prædicto ducatu præsentī charta nostra por nobis et hæredibus nostris annectimus et unimus eidem in perpetuum remansur', ita quod ab eodem Ducatu aliquo modo nullatenus separentur, nec alicui seu aliquibus aliis, quam dicti loci Ducibus per nos vel hæredes nostros donentur, seu quomodolibet concedantur; quæ indissolubilis et inseparabilis connexio tali modo fieri non potest charta tantum, Parliamenti statuto non adhibito. 3. Impossibile foret, legis regula, statum in terrâ cessare et rursus reviviscere (sicut clausula revivificationis intendit) charta tantum: quæ clausula est, ita quod præfato Duce seu aliis ejusdem loci Ducibus decedent', et filio seu filiis, ad quos dictus Ducatus prætextu, doni et concessionis nostrorum prædictorum spectare dignoscitur tunc non apparentibus,

father, father and son, now the father being the first begotten son of the grandfather, is Duke of Cornwall in the life of the King, and eo instante that the grandfather dies, the father is King, and eo instante also the son is Duke of Cornwall; which course of inheritance being against the rules of the common law (a), cannot be created by charter without the force and strength of an act of Parliament. And in this case the King's eldest son has (c) this dignity by right of inheritance, in like manner as the eldest sons of grandes and Peers of the realm who have supereminent dignities in them, have in appellation and curtesy only; as suppose there be a grandfather Baron, and a father and son; and the King creates the grandfather an Earl, eo instante the father is a Baron in appellation and curtesy, and eo instante that the grandfather dies,* the father is Earl, and the son Baron by curtesy: et sic de similibus. 2. It would be impossible that the possessions of the duchy should be so annexed by the charter in the same manner as the charter purports; for the clause of annexation is, Quæ quidem omnia castra, burg', vill', maneria, &c. præd' ducatu, præsentī charta nostra pro nobis et hæredibus nostris annectimus et unimus eidem in perpetuum remansur', ita quod ab eodem ducatu aliquo modo nullatenus separentur, nec alicui seu aliquibus aliis, quam dicti loci ducibus per nos vel hæredes nostros donentur, seu quomodolibet concedantur: which indissoluble and inseparable annexation cannot be made in such manner by charter only, without

Course of inheritance against the rules of the common law cannot be created without an act of Parliament.

(b) Co. Lit. 27] a. 3 Madd. 533

(c) Co. Lit. 16 a. acc. Collins Baron. 165.

6 Co. 53 b.

[* 17 a.]

The possessions of the duchy cannot be annexed as the Charter purports, without act of Parliament.

* Co. Lit. 27. a.
An estate in
land cannot
cease and re-
vive again by
Charter only.
Co. 1. 87. a.

act of Parliament. 3.* It would be impossible by the rule of law, that an estate in land should cease and revive again, as by the clause of revivification is intended, by charter only (B); which clause is, ita quod præfat' Duce, seu aliis ejusdem loci ducibus decedent', et filio seu filiis, ad quos dictus ducatus prætextu doni et concessionis nostrorum prædictorum spectare dignoscitur, tunc non apparentibus, idem ducatus cum castris, burg' villis, &c. ad nos vel hæredes nostros Reges Angliæ revertatur* in manibus nostris et ipsorum hæredum nostrorum Reg' Angliæ retinend', quousque de hujusmodi filio seu filiis in dicto regno Angliæ hæreditarie successur' appareat, ut dictum est, quibus tunc successive ducatum illum cum pertinentiis, pro nobis et hæredibus nostris concedimus et volumus liberari, tenend' prout superius est expressum.

For although a (a) rent newly created (to which no man can have an ancient right) may cease for a time, and revive again, yet land, which is of a more solid nature, and to which another may have an ancient right, cannot so do, as it is resolved in Corbet's case, in the First Part of my Reports.

The second reason was, ex absurdo, that six others being created Earls at the same time † for the honour of the Prince, all their creations and donations should be firm and good in law to some of them and the heirs of their bodies; and to others in fee-simple; and that the creation of the Prince himself, and of such a most

idem Ducatus cum castris, burg' villis, &c. ad nos vel hæredes nostros Reges Angliæ revertatur, in manibus nostris et ipsorum hæredum nostrorum Regum Angliæ retinend', quousque de hujusmodi filio seu filiis in dicto regno Angliæ hæreditarie successur' appareat ut dictum est, quibus tunc successive ducatum illum cum pertinentiis pro nobis et hæredibus nostris concedimus, et volumus liberari: tenendum prout superius est expressum. Quanquam enim redditus de novo creatus (ad quem nullus homo, habere potest jus superius) pro tempore cessare potest et rursus reviviscere, terra tamen (quæ solidioris est naturæ, et ad quam alter habere potest jus superius) ita facere non potest, sicuti determinatum est in casu Corbet in prima Relationum mearum parte.

A rent newly
created may
cease for a time
and revive
again.

(a) 1 Co. 87. a.
130 a Perk.
sect. 327. Plowd
156 a. 10 H.
7. 13 b. 5 E.
2. Dower 143.
12 E. 3. Con-
dit. 11. 22 E. 3.
19 a. 4 Leon.
83. 6 Co. 41
a. 8 Co. 17. b.

† Post. 21.

Secunda ratio fuit ex absurdo, eo quod, cum eodem tempore sex alii fuerint creati Comites in honorem Principis, illorum omnes creationes et donationes firmæ forent et in lege validæ, quibusdam eorum et hæredibus de corporibus suis exeuntibus, et aliis in feodo simplici, creatio vero Principis ipsius, Principisque

a) Vid note (1). Corbet's Case, Vol. 1. p. 212.

tam celeberrimi, et concessio dictorum castrorum, maneriorum, &c. in lege forent invalidæ, vel de statu tantum ad voluntatem, et hoc tunc temporis quando fuerunt Judices (qui semper attendunt Parliamentum) optime eruditi et jurisperitissimi.

Videre deinde est quæ sunt in lege autoritates et exempla ad proband' dict' chartam in se habere vim statut' Parliamentarii. Et hoc quadrupliciter probatum fuit : 1. Ex ipsâ chartâ et ex autoritatibus in lege cum hac concurrentibus : 2. Ex concessionibus et statutis per Principem factis, et sub literis patentibus Regum : 3. Judiciis secundum usitatum legis modum latis, et determinationibus Judicum in curiis Regiis : 4. Determinationibus in Parlamento per Regem et totum corpus regni. 1. In ipsa charta facta Principi duæ clausulæ fuerunt observatæ : 1. In Principio chartæ dictum est, Considerationis nostræ intuitus ad personam dilecti et fidelis nostri Edwardi, comitis Cestriæ, filii nostri primogeniti, intimos convertentes, volentesque personam ejusdem honorari, eidem filio nostro nomen et honorem Ducis Cornubiæ de communi assensu et consilio Prælatorum, Comitum, Baronum, et aliorum de consilio nostro et præsentî Parlamento convocat' existent', dedimus, &c. Ex quo manifestum est dictam chartam autoritate Parliamenti factam fuisse. Et determinatum fuit hanc clausulam in omnes chartæ partes se extendere : quæ clausula per se fuisset sufficiens. 2. In conclusione et fine chartæ (quæ recordi est parcella) dict' est, Datum per

noble Prince, and the grant to him of the said castles, manors, &c. should be either void in law, or but an estate at will; and especially in such a time when the Judges (who always attended the Parliament) were the most wise and learned in the law.

It remains then to see what authorities and precedents there are in law to prove the said charter has the* force of an act of Parliament. And that was proved four manner of ways. 1. Out of the charter itself, and authorities in law agreeing to it. 2. By grants and estates made by the Prince, and by letters patent of Kings. 3. By judgments given according to the ordinary course of law, and resolutions of the Judges in the King's courts. 4. By resolutions in Parliaments by the King and the whole body of the realm. 1. In the charter itself made to the Prince, two clauses were observed, which prove that it had the authority of an act of Parliament. 1. In the beginning of the charter it is said, Considerationis nostræ intuitus ad personam dilecti et fidelis nostri Edwardi, Comitis Cestriæ, filii nostri primogeniti, intimos convertentes, volentesque personam ejusdem honorari, eidem filio nostro nomen et honorem Ducis Cornubiæ de communi assensu et consilio Prælatorum, Comitum, Baronum, et aliorum de consilio nostro in præsentî Parlamento convocat' existent' dedimus, &c. † By which it appears, that the charter was made by authority of Parliament. And it was resolved, that this clause extends to all the parts of the charter, which clause of itself

Authorities and precedents to prove the said charter has the [* 18 a.] force of an act of Parliament.

Authorities.

† Co. Lit. 81 a. 98 b.

[* 18 b.]

had been sufficient. 2. In the close and end of the charter, which is parcel of the record, it is said, Dat' per manum nostram apud Westmonast' 17 die* Martii, anno regni nostri 11. per ipsum Regem et totum consilium in Parlamento. Which also proves that it was made by authority of Parliament. And it was more for the honour of the King that the creation and donation should be in the form of a charter, and that witnesses should be called to it, so that nothing should be omitted which belonged to a complete charter, and so principally to proceed from the King, as the fountain of all honour and dignity; than if the creation and donation had been only by act of Parliament; in which all would be donors. Note, reader, If letters patent pass by bill signed without privy seal, the patent is subscribed, per ipsum Regem, (and then the bill signed remains with the Chancellor for his warrant :) and when it passes by bill signed, and by privy seal also, then the privy seal remains with the Chancellor, and the bill signed remains with the Clerks of the Signet, and the Lord Privy Seal has an extract thereof to make the privy seal, and then the letters patent are subscribed, per breve de privato sigillo(c): and if autoritate Parliamenti be added then it passes ac-

manum nostram apud Westmonast' 17 die Mart', anno regni nostri undecimo, per ipsum Regem et totum consilium in Parliament': quo etiam probatur illam fuisse factam autoritate Parliamenti. Et in majorem fuit Regis honorem quod creatio et donatio foret in forma chartæ, et testes ad hanc advocati, (ut nihil omitteretur quod ad perfectam spectat chartam) et sic præcipue e Rege, veluti e fonte totius honoris et dignitatis, emanaret, quam si creatio et donatio fuisset statuto Parliamentario tantum, in quo omnes essent donatores. Nota lector, si literæ patentes exituræ sint sub billa signata, et non sub sigillo privato, subscribuntur, Per ipsum Regem (et tunc billa signata manet Cancellario in warrantum.) Et quando exituræ sunt sub billa signata et sub sigillo etiam privato, tunc privatum sigillum manet Domino Cancellario, et billa signata manet Clericis Signaturæ, et ex hac alatum est Domino Privati, Sigilli extractum ad faciend' breve de privato sigillo: et tunc literæ patentes subscribuntur, Per breve de privato sigillo; et si hæc verba (scilicet, autoritate Parliamenti) apponantur, tunc exeunt secundum statutum de anno 27 H. 8. cap. 11. Et quando Rex signat literas ipsas patentes in superiori parte, et signatura et magnum sigil-

Note. If letters patent pass by bill signed without privy seal, the patent is subscribed per ipsum Regem, and then remains with the Chancellor for his warrant: when it passes by privy seal also, the privy seal remains with the Chancellor, and the bill signed remains with the Clerks of the Signet, &c.

(c) "Since the stat. 18 H. 6. cap. 1. patents have frequently concluded thus, viz. per breve, de privato sigillo et die dati prædicta autoritate parliamenti, which last words divers patents (of that age and some that follow) have in the expression of their warrant by reason of the stat. 18 H. 6. c. 1. by which it was enacted that

"letters patent shall be dated the same day wherein the warrant for them is received, as to this day; from that time and act the law hath continued, Selden's Works, Vol. 3. p. 785." *Note by Serjeant Hill.* Vid. Davenport on Grants and Resurreptions 291 to 307. *College of Physicians and Cooper*, 3 Keb. 588.

lum paribus passib' incedunt uno et eodem tempore, tunc subscribuntur, Per ipsum Regem manu sua propria. Et quando autoritate et assensu Parlamenti conficiuntur, tunc subscribuntur, Per ipsum Regem et totum consilium in Parlamento, vel in hujusmodi effectum. Et scire est, quod priscis temporibus, tam quando terra, immunitas, sive hæreditamentum de Rege transferebat' de statu hæreditario, quam in creatione cujusquam ad honorem et dignitatem, per literas patentes, conclusio fuit, Hiis testibus. A diu vero, pro terris, immunitatibus, vel hæreditamentis hæc formula intermissa fuerit, et nunc, et sic a diu, literæ patent' concluduntur, Teste meipso, &c. At in omnib' ad honorem et dignitatem creationibus, per literas patentes, antiqua formula (scilicet, Hiis testibus) manet usque in hodiernum diem. Et quod actus Parlamenti editi sunt sub formula char' Reg' multa nobis in lege sunt testimonia. Primo Magna Charta, edita 9 H. 3. cujus principium est, Imprimis concessimus Deo et hac præsentī charta nostra confirmavimus pro nobis et hæredibus nostris imperpetuum, &c. concluditur, Hiis testibus, &c. et datum per manum nostram, ut nostræ etiam chartæ conclusio est. Et quamvis in charta non liqueat, verbis expressis, quod facta fuit autoritate Parlamenti, quia tamen diversæ ejus partes legem communem et invertunt et mutant (quod charta tantum facere non potest) et constat ex capite ultimo, quod pro dicta magna charta Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones,

cording to the act of 27 Hen. 8. cap. 11. And when the King signs the patent itself in the upper part, and the signature and great seal go together, then it is subscribed, propria per ipsum Reg' manu sua.

*And when it is made by authority and consent of Parliament, then it is subscribed, Per ipsum Regem, et totum consilium in Parlamento, or to the like effect. And it is to be known, that in ancient times, as well when any land, franchise, or hereditament, did pass from the King of any estate of inheritance, as in the creation of any to honour and dignity by letters patent, the conclusion was with (a) Hiis testibus: but of long time for lands, franchises, or hereditaments, this form has been discontinued, and now, and so it hath been of long time, the patent concludes, (b) Teste meipso, &c. But in all creations to honour and dignity by letters patent, the ancient form of conclusion of Hiis testibus is continued to this day; and that acts of Parliament do go in the form of the King's charter, we have many examples in law. 1. (c) Magna Charta, made 9 Hen. 3. which begins, Imprimis, concessimus Deo, et hac præsentī charta nostra confirmavimus pro nobis et hæredibus nostris imperpetuum, &c. and the charter concludes with Hiis testibus, et datum per manum nostram, as ours doth: and although it doth not appear in the charter itself by express words, that it was made by authority of Parliament, yet because many parts of it cross and change the common law, which a charter alone cannot do, and it

[* 19 a.]
When made by authority of Parliament how subscribed.

(a) Co. Lit. 7 a.
2 Inst. 77, 78.

(b) Co. Lit. 7 a.
2 Inst. 77.

Examples of acts of Parliament, that go in the form of the King's charter.

(c) Co. Lit. 81 a.
2 Inst. 78.

[* 19 b.]

appears by the last chapter, *that for the said grand charter, Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones, Milites, liberi tenentes, et omnes de regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum: This clause in the conclusion of the charter, proves it by implication to be an act in (a) form of a charter (v). And, lastly, it hath

(a) 2 Inst. 78.

always had the allowance of an act of Parliament, and therefore ought to be so taken; which is a stronger case than ours is, for here are full and express words; and anno 21 H. 3. brev. 881. in the Earl of Chester's case, the 11 chapter of Magna Charta, quod communia placita non sequantur curiam nostram, is cited to take away the jurisdiction of the King's Bench; and this grand charter had been allowed and confirmed above (b) thirty times by acts of Parliament. So the act of 21 H. 3. de anno bissextili begins, Rex Justiciariis suis de Banco, &c. in the form of a patent or writ. The statute of protections, anno 33 E. 1. de conjunctim feoffatis, anno 34 E. 1. which begins, Rex omnibus ad quos, &c., and concludes, in cujus rei testimonium has literas nostras fieri fecimus patentes. Teste, &c. So the statute of Artic' Cleri, 9 E. 2. begins E. Dei gratia, &c. omnibus ad quos, &c. and concludes, in cujus, &c. Teste, &c. Two statutes made anno 14 E. 3. one pro clero, and the other concern-

Milites, liberi tenentes, et omnes de regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum: hæc clausula in conclusione chartæ implicite probat illam esse Actum sub chartæ formula: semper denique habuit approbationem actus Parliamenti, ideoque sic haberi debet; qui casus nostro fortior est, hic enim plena et expressa sunt verba: et 21 Hen. 3. titulo Breve 881. in casu Comitis Cestriæ, undecimum caput Magnæ Chartæ, quod communia placita non sequantur curiam nostram, citatur, ad jurisdict' Banci Regii tollendam: et hæc magna charta approbata et confirmata fuerit statutis Parliamentariis supra trigesies. Item, actus de anno 21 Hen. 3. de anno bissextili, incipit, Rex Justiciariis suis de Banco, &c. sub formula diplomatis seu brevis. Statutum de protectionibus, anno tricesimo tertio Ed. 1. de conjunctim feoffatis, anno tricesimo quarto Ed. 1. quod incipit, Rex omnibus ad quos &c. et concludit, in cujus rei testimonium has literas nostras fieri fecimus patentes, &c. Teste, &c. Item statutum de Articulis Cleri, 9 Ed. 2. exorditur, Edwar' Dei gratia, &c. omnibus ad quos, &c. et desinit, in cujus rei, &c. Teste, &c. Duo stat. edita an. 14 Ed. 3. unum pro clero, alterum de Angl', quod non subjecta foret Galliæ, et multa alia statuta Parliamentaria edita sunt sub formula chartæ Regiæ.

(d) In the petition of Right, drawn up by the House of Commons in 1628, and probably revised by Lord Coke himself, the third section begins, "And whereas also by

"the statute, called the Great Charter of
"the Liberties of England, it is declared
"and enacted, &c."

Et determinatum fuit, hæc verba in actu vel charta (scilicet autoritate Parliamenti) sufficere ad illum faciendum actum Parliamenti. Bracton, curiam Parliamenti appellat magna curia, magnus consilium, et commune consilium regni. Dictum statutum, de an. bissextili, est, Rex per consilium fidelium subdito. Statutum de bigamis, anno 4 Ed. 1. In præsentia venerabilium patrum quorundam Episcoporum Angli' et alior', de consilio Reg. 7 Ed. 1. de religiosis, de consilio Prælatorum Comit', Baron', et aliorum fidelium Reg. nostri, de consilio nostro existentium, providimus, statuimus, et ordinavimus: et in statuti (ut dicam) fronte, dominus Rex in Parlamento suo statuta edidit. 13 E. 1. Statuto de Winton', in eodem statuto dicitur, domin' noster Rex, ad minuendum vires felonum, statuit pœnam hoc casu, &c. et in conclusione statuti antedicti, Rex mandat et prohibet quodammodo neque nundinum, neque mercatus teneatur in cœmisteriis. 20 E. 1. statutum de vocatis ad warrant', dominus Rex de communi consilio suo statuit. Statutum de appellatis 28 E. 1. Domin' Rex in Parliament' statuit. 27 E. 3. cap. 1. de stapula, cur' Parliam' nominatur mag' consil'. Et multi act', huc spectantes, ad demonstrand' varietatem contextus statutorum Parliamenti citat' fuerunt. Et originalia bre-

ing England, that it should not be in subjection to *France, and many other acts of Parliament are made in the form of the King's charter (E). And it was resolved, that these words in an act, or charter, (by authority of Parliament) are sufficient to make it an act of Parliament. Bracton calls the Court of Parliament, magna curia, magnum consilium, and commune consilium regni. The said statute De anno Bissextili is Rex per consilium fidelium subditorum. The statute De bigamis, anno 4 E. 1. In præsentia venerabilium patrum quorundam Episcoporum Angliæ, et aliorum de consilio Regis. 7 E. 1. De religiosis, de consilio Prælatorum, Comitum, Baronum et aliorum fidelium regni nostri, de consilio nostro existentium, providimus, statuimus, et ordinavimus: and, as I may say, in the front of the act, dom' Rex in Parlamento suo (a) statuta edidit. 13 E. 1. The statute of Winchester, in the said act it is said, our Lord the King, to abate the power of felons, hath established a pain in this case, &c., and in the end of the said act, the King commands and forbids, that from henceforth neither fair nor market be holden in church-yards. 20 E. 1. The statute De vocat' ad warrant' domin' Rex de (b) communi consilio suo statuit. The statute De appellatis 28 E. 1. Dom' Rex in Parl' (c) statuit. 27 Ed. 3. c. 1. Staple, the Court of Parliament is called

[* 20 a.]

The words (by authority of Parliament) in an act or charter are sufficient to make it an act of Parliament.

(a) 2 Bulst. 187.

(b) 2 Bulst. 187.

(c) 2 Bulst. 117.

(E) The act *quia emptores* is a statute, though the King alone speaketh, viz. *Dominus rex in parlamento suo, &c. ad instantiam magnatum regni sui concessit, providit, et statuit.* But because it is *dominus rex in*

parlamento, &c. concessit, it is as much in this case (being an ancient statute), as *dominus rex auctoritate parlamenti concessit.* Co. Litt. 98 a. 98 b.

[* 20 b.]

Hob. 151.
Co. Lit. 99 a.
n. 1.
W. Jones 103.
Bac. Ab. Stat.
A.
Vin. Ab. Stat.
A.
Com. Dig. Parl.
R. 3.

(a) Co. Lit. 98.

(b) Co. Lit. 98.

An act, that
the King, with
the assent of
the Lords, or
with the as-
sent of the
Commons, is
not an act of
Parliament.

(c) Plowd. 79
a. b. Dyer 144.
pl. 60. Moor
824. Co. Lit.
159 b. Hob. 111.

the Gr. Council ; and many acts to this purpose were cited, to shew the variety of penning *of acts of Parliament : and the original writs which are founded on any statute say, quare cum de communi consilio reg' nostri Angl' provi- sum sit, &c., and the writ on the stat. of labours saith, cum per consilium nostrum pro communi utilitate regni ordinatum sit. 11 H. 7. 27. If an act of Parliament be penned by assent of the King, and of the Lords Spiritual and Temporal, and of the Commons, or, it is enacted by authority of Parliament, it is a good act ; but the most usual way is, that it is enacted by the King by the assent of the Lords, Spiritual and Temporal, and of the Commons. 7 H. 7. 14. a. b. and (39) 34 Ed. 3. 12. acc. and there it is said, that there are many statutes which are indited quod dominus Rex statuit : yet if they be entered in the Parliament (a) roll (F), and always allowed for acts of Parliament, it (b) shall be intended that it was by authority of Parliament : but if an act be penned, that the King, with the assent of the Lords, or with the assent of the Commons, it is no act of Parliament, for (c) three ought to assent to it, *scil.* the King, the Lords, and the Commons, or otherwise it is not an act of Parliament ; and by the record of the act it is expressed which of them gave their assent, and that excludes all

via Regis, super aliquo fundata statuto, dicunt, quare cum de communi consilio regni nostri Ang' provi sum sit, &c. et breve super stat' de laborator' dic', cum per consilium nostrum pro communi utilitat' reg' ordinat' sit. 11 H. 7. 27. Si actus Parliam' scribatur, de assensu Regis et Dominorum Spiritual' et Temporal' et Comunitat' vel, inactitat' est autoritate Parliam' hujusmodi valet act' ; formalis vero magis est qui sancitur, per Regem de assensu Dom' Spirit' et Temp' et Comunit' : 7 H. 7. 14. et 39 E. 3. 12. cum hoc concordant : et ibid' dicit', quod multa sunt statut' quæ scribunt', domin' Rex statuit, si tamen rotulo Parliamentario intrentur, et semp' ut act' Parliament' approbentur, intendetur hæc autoritat' Parliamenti fuisse : si vero actus scribatur, Rex cum assensu dom' vel cum assensu communitat' iste nullus est Parliamenti actus ; huic enim tres assentire debent, scilicet, Rex, domin', et communitas, aliter actus Parliamenti non est ; et per recordum act' exprimitur quis horum assensit, et hoc omnes intentiones (quod aliqui alii assenserunt) excludit. Et sic est diversitas inter generalem et particularem contextum actus Parliament'. Vide 8 H. 6. c. 29. et 5 Rich. 2. c. 2. de Fugitivis, 21 E. 3. 6. Episcopi Norwicensis casum. Et hoc ipso Parliament' de

(e) After the royal assent is given, the Clerk of the Parliament transcribes every public act into a roll, which is delivered into Chancery, and is considered the original record : but private acts are not enrolled without the suit of the party ; and

therefore the original bill filed among the bills of Parliament, and marked with the great seal, as the course is, is the original record of it. *Rex and Lord Hunsdon v. Countess Dowager of Arundell and the Lord William Howard*, Hob. 100.

11 Ed. 3. Hen' fil' Henrici Comit' Lancastriæ, creatus fuit per chart' (ad requisitionem Prælatorum et Procerum et Communitatis regni nostri in instante Parlamento nostro apud Westm' convocat') in Comit' Derb', sibi et hæred' masculis de corpore suo : item per aliam chartam Rex creat' Willihelm' de Bohun (de communi assensu Prælatorum, Comit', Baronum, et aliorum, de consilio nostro in præsent' Parliam' nostro) in Com' Northampt', sibi et hæred' de corpore suo : isto eod' Parliam' per chart' creat' Hugonem de Audley in Com' Gloucest', de definito dict' Parliam' nostri consilio, &c. Et per chart' in verb' similib' Rex in eod' Parliam' creat' Willihelmum Clynton in Com' Huntingd' in feodo talliat', Robert' de Ufford in Com' Suff' in feodo simplici, Willihelm' de Monte acuto in Com' Sar' in feod' simplici : et hæc omnes fuerunt creationes cum donationib' terrar' (ad sustinendum nomen et onus) per auctoritatem Parliam', sub formula chartæ Reg' cum conclusione de hiis testibus, et eor' nonnullæ cum subscriptione, per Regem et consilium in Parlamento aliæ vero, per regem et consilium in pleno Parlamento et aliæ etiam, per ipsum Regem et totum consilium in Parliam' &c. quæ omnes vim habent unam et eandem. Et hæc fuerunt argumenta collecta ex ipsa charta,

other intendments that any other gave their assent (G); and so there is a difference between a general and particular penning of an act of Parliament. Vide 8 H. 6. c. 29. and 5 R. 2. c. 2. of *fugitives: 21 E. 3. 6.(60) The Bishop of Norwich his case. And at this very Parliament of 11 E. 3. Henry, son of Henry, Earl of Lancaster was created by charter, ad requisitionem Prælatorum, et Procerum et communitatis regni nostri in instante Parlamento nostro apud Westm' convocat' to be Earl of Derby, to him and the heirs males of his body. Also by another charter, the King created William de Bohun, de communi assensu Prælatorum, Comit', Baronum, et aliorum de consilio nostro in præsent' Parlamento nostro, Earl of Northampton, to him and the heirs of his body. And at the same Parliament, he by charter created Hugh de Audley Earl of Gloucester, de definito dicti Parliam' nostri consilio, &c. And by charters with the like words, the King at the same Parliament, created William de Clynton Earl of Huntingdon in tail, Robert de Ufford Earl of Suffolk in fee-simple, William de Monte Acuto Earl of Salisbury in fee-simple; and all these were creations with donations of lands, ad sustinend' nomen et onus, by authority of Parliament, in form of the King's

Vid. Hawkins and Ruffhead's Prefaces to [* 21 a.] the Statutes.

Antea 17 b.

Postea 22.

(c) This position, that there can be no presumption of the assent of the Lords or Commons, where the record names one and omits the other, has been vehemently opposed. Vid. the Prefaces by Serjt. Hawkins and Mr. Ruffhead to their several editions of the statutes; and vid. Hargrave's note. 2. Co. Lit. 159 b., where vid. also an

account of the discussion as to the distinction between ordinances and statutes.

Acts which passed in Parliament before time of memory (*viz.* the coronation of Rich. I. in 1189) are not pleadable as statutes, but are to be considered as incorporated with and part of the common law. Hales' Hist. C. L. 3.

charter, with the conclusion of hiis testibus, and some with such subscription, per Regem et consilium in Parlamento; and some per Regem et consilium in pleno Parlamento; and others, per ipsum Regem et totum consilium in Parliament' &c. all which are of one and the same effect. And those were the proofs collected out of the charter* itself, and other acts of Parliament which are penned in the form of the King's charter.

[* 21 b.]

Proved by letters patent that the charter 11 Edw. 3. was made by authority of Parliament.

2. The same is proved by letters patent, as ex rotulo patentium de anno 14 E. 3. num. 18. which was within three years after this charter: the King granted to the Prince, by the name of Edward Duke of Cornwall, &c. to be Lieutenant of the realm so long as the King should be beyond the sea. In anno 21 E. 3. ex rot' patent' in Turre, the said Prince (within ten years after his creation) for the fine of a thousand marks, did demise to Tideman de Limbergh, Cunagium stannariæ totius Ducatus Cornubiæ pro tribus annis, necnon emptionem totius stanni tam infra dictum ducatum Cornubiæ quam com' Devon' fossi et fodendi quod vendi debet, reddendo annuatim three thousand marks, which the Prince could not have done, if he had but an estate at will, as a greater he had not, if the said charter had not the force of an act of Parliament. Other letters patent were cited in 5 H. 4. ex rot' patent' ibidem, Rex, &c. Sciatis quod regum Angliæ primogeniti filii in ducatum Cornubiæ hæreditarie sunt successuri: and divers other letters patent were cited to the same effect.

et aliis statutis Parlamento, quæ scribuntur in forma chartæ Regis.

2. Hoc probatur literis patentibus, sicuti ex rotulo patentium de anno 14 E. 3. num. 18. (quod fuit infra tres ann' post confectionem chartæ) Rex concedit Principi, per nomen Edwardi Ducis Cornubiæ, quod locum tenens esset regni tam diu quam Rex foret ultra mare. In anno 21 E. 3. ex rot' patentium in Turre, dictus Princeps (infra decem annos post creationem suam) pro fine mille marcarum, dimisit cuidam Tideman de Limberg cunagium stannariæ totius ducatus Cornubiæ pro tribus annis, necnon emptionem totius stanni tam infra dictum Ducatum Cornubiæ quam com' Devon' fossi et fodendi, quod vendi debet, reddendo annuatim 3000 marcas: quod Princeps facere non potuit, si habuisset statum solummodo ad voluntatem, sicuti majorem non habuerat, si dicta charta in se non habuisset vim actus Parliamenti. Aliæ liter' patentes citabantur in an' 5 H. 4. ex rotul' patentium ibidem, Rex, &c. sciatis quod regnum Angliæ primogeniti filii in ducatum Cornub' hæreditarie sunt successuri. Et diversæ aliæ literæ patentes citabantur in hoc propositum.

3. Hoc etiam probatur iudiciis et determinationibus Judiciarum. 18 Ass. pl. 5. Thorpe dicit, quod adjudicatum fuit in Parlamento, si donatio facta sit alicui et hæredibus suis masculis, quod sorores et alii hæredes collaterales perinde atque hæredes masculi, hæreditabunt, quoniam per istiusmodi donationem habet feodum simplex: et inferebatur, quod tal' determinatio bene esse potest ad Parlamentum in anno undecimo Edwardi tertii, ubi dict' creatio princip' et annexatio dictarum terrarum perpendebantur: et quoniam hoc effici non potuit donatione vel concessione, consulebatur quod fieret actu Parliamento; eo quod non fuit aliquis huiusmodi descensus vel cursus hæreditarius ad communem legem. 21 Edwardi 3. 41. manerio de Berkhamsted (per dictam chartam ducatus Cornubiæ annexo) iudices approbant donationem dicti maner' fore in lege validam principi; quod esse non potuit (ut sæpius dictum fuit) si ill' donatio non habuisset vim actus Parliamento, 39 E. 3. 12. Rex anno undecimo regni sui ad Parlamentum suum tentum apud Westmon' præfecit Principem in ducem Cornubiæ, et diversos alios in Comites regni sui; inter quos fuit Willihelmus de Monte acuto, Comes de Sarum. Et in 43 Ass. pl. 15. 45 Ass. pl. 6. Donatio et annexatio possessionum dicti ducatus, Principiconcessarum per dictam chartam, approbantur foret in lege validæ. 50 E. 3. inter record' in Turre de eodem anno, Johanna uxor dicti Principis dotata fuit in

3. The same is proved by judgments and resolutions of Judges: in (a) 18 Ass. pl. 5. Thorp saith, that it was adjudged in Parliament, that if a gift be made to one and to his *heirs (b) males, that his sisters and other heirs collateral, as well as heirs males, shall be inheritable, because by such gift he hath fee-simple (u): and it was inferred, that such resolution might well be at the Parliament 11 E. 3. where the said creation of the Prince, and annexation of the said lands, were in consideration: and because it could not take effect by gift or grant, it was advised that it should be by act of Parliament, because there was not any such descent or course of inheritance by the common law. 21 E. 3. 41. the manor of Berkhamsted was by the said charter annexed to the said duchy, the Judges there allowed the gift of the said manor to be good to the Prince, which could not be, as it hath been often said, if it had not the force of an act of Parliament, 39 Ed. 3. 12. The King, anno 11 of his reign, at his Parliament held at Westminster, made the Prince Duke of Cornwall, and many others, Earls of this realm, amongst which was William de Monte acuto, Earl of Salisbury. And in 43 Ass. pl. 15. & 45 Ass. pl. 6. the gift and annexation of the possessions of the said dukedom, granted by the said charter to the Prince, was allowed to be good, 50 E. 3. inter record' in the Tower, in the same year Johan the wife of the said Prince, was, by order of law

By judgments and resolutions.

(a) Raym. 55.

[* 22 a.]

(b) Raym. 55.
Dav. 34 b. 35 a.
43 a.

27 H. 8. 27 a.
Co. Lit. 13 a.

27 a. b. Br.

Devise 1.

Br. Estates 2,

33. 9 H. 6. 25 a.

18 E. 3. 45 b.

2 And. 139, 156.

1 Co. 43 b. 46 a.

49 a. 7 Co. 40 b.

Moor. 416.

Hob. 224.

Plow. 251 a.

335 a.

Lit. sect. 31.

1 Roll. 860.

1 Bulst. 10, 222.

1 Mod. Rep.

196. B. N. C. 5.

1 Brownl. 45.

2 Brownl. 334.

Antea 21.

(u) Vid. note (A) Beresford's case, ante, p. 136.

[* 22b.] endowed in *Chancery, of the possessions granted by the said charter to the Prince her husband; ergo, the charter did convey an estate of inheritance to the Prince. Anno 5 H. 4. ex Rot. Parl' the same year a petition in Parliament was exhibited by the Commons, for the resumption of all grants and letters patent before made, of the lands of the said duchy of Cornwall, to which the King and the Lords with great gravity and justice, knowing the danger such private bills would introduce, although it concerned the King's eldest son (an excellent precedent to give a caveat to pass few or no private bills between subject and subject, but to refer them either to the courts of equity, or of law, where the cause may be duly examined, and upon deliberation discerned and adjudged) gave such answer, it is agreed by the King and the Lords in Parliament, that the said lord the Prince, by advice of his counsel, may have writs of Scire facias, or other recovery, the best he may have by the statutes and laws of the kingdom, according as the case requires: and thereupon a (a) Scire facias was brought in the name of the King, at the petition of the Prince, Trin. 5 H. 4. in the Chancery to repeal a grant which Rich. 2. made (and which was confirmed by King H. 4.) of the manor of Risberghe in the county of Oxford parcel of the said duchy to Sir Lewis Clifford, and *his heirs, who was returned, summoned, and made default; per quod de advisament' Justiciariorum, &c. consideratum fuit tunc et ibidem, quod literæ prædict'

Danger of private bills between subject and subject.
Note.

(a) 2 Roll. 192.

[* 23a.]

Cancellaria de possessionibus, Principi, suo marito, per dictam chart' concessis: ergo ill' chart' dat Principi stat' hæreditarium. Anno 5 H. 4. ex rot' Parliam. eodem an' petitiō in Parliamentum exhibitā fuit per communitatem, ad resumendas omnes concessiones et literas patentes ante tunc factas de terris dicti Ducatus Cornubiæ: ad quam Rex, et domini, summa cum gravitat' et justitia (scientes periculum quod bill' hujusmodi privat' introducerent) quamquam spectabat ad fil' Reg' natu maxim' (singulare exempl' admonition' dandæ, quod per pauca aut nullæ edantur billæ privat', int' subdit' et subditum, sed potius quod referantur ad cur' vel æquitat', vel legis, ubi causa et recte exequi, et deliberatione discerni et adjudicari potest) responderunt, accordatum est per regem et dominos in Parl', quod dict' dominus Princeps de advisamento concilii sui habeat brevia de Scire facias vel aliam recuperation', optimam quam habere potest per stat' et leges reg', secund' hoc quod casus requir'. Et sup' hoc brev' de Scire facias latum fuit Reg' nomine ad petitiō' Principis. Trin. 5 H. 4. in Cancellaria ad repellendam concessionem factam per Rich. 2. (et confirmatam per Regem H. 4.) de manerio de Risberghe in com' Oxon', parcell' dicti ducatus, Ludovico Clifford Milit' et hæred' suis, qui returnat' fuit summonit', et fecit default, per quod de advisament' Justiciariorum, &c. consideratum fuit tunc et ibidem, quod literæ prædict' præfato Ludovico ut præferatur fact' revocentur et annullentur, &c. Aliud breve

de Scire facias latum fuit anno 6 Hen. 4. Regis nomine, ad petitionem Principis, in Cancell' ad repellendam concessionem factam per Regem Rich. 2. (et confirmatam per Regem Hen. 4.) de maherio de Heleston in Kerier in comitatu Cornubiæ, Nicholao Sarnfield Militi, et Margaretæ uxori ejus, pro vita eorum; et ad return' brevis de Scire facias, scilicet, Octab' Hil', Princeps per Tho. Beston attor' suum apparet, et dicta etiam Margareta, marito suo defuncto, et prædict' Princeps petit quod literæ prædictæ in forma prædicta factæ revocentur et adnihilentur, et quod prædict' manerium, &c. in manus domini Regis seisiatur, et eidem Principi tanquam membrum et parcell' ducatus prædicti juxta formam et effectum dictorum doni, concessionis, et unionis præfati avi domini Regis, habendum et tenendum, liberetur: et hoc recordum liberat' fuit per Cancellarium in Bancum Regis (Gascoigne tunc temporis existen' Capitali Justiciario) et super hoc Margareta placitando, producit concessionem Reg' Rich. 2. sibi pro vita factam, et precatur in auxilium, de Rege, et habuit, &c. Et curia dat diem. &c. Et Princeps ad diem protulit breve de Procedendo in loquela, dum tamen ad judicium reddend' domino Rege inconsulto nullatenus procederetur; et super hoc Margareta fecit default', et inde dies dat' est per cur' Principi, etc. Ad quem diem princeps protulit breve' de Procedendo ad Judicium; super quo cur' Judicium reddidit, ut sequitur: consideratum est, quod literæ præd' in forma præd' fact' revocentur

præfat' Ludovico ut præferatur factæ revocentur et adnulentur, &c. Another (a) Scire facias was brought anno 6 H. 4. in the name of the King, at the petition of the Prince, in the Chancery, to repeal a grant made by King Richard the second, and confirmed by King Henry the fourth, of the manor of Heleston, in Kerier in the county of Cornwall, to Nicholas Sarnfield, Knight, and Margaret his wife, for their lives, and at the return of the Scire facias, sc. Octa. Hil. the Prince by Thomas Beston his attorney, appeared, and the said Margaret also, her husband being dead, et prædictus Princeps petit quod literæ prædictæ in forma prædicta factæ revocentur et annihilentur, et quod prædictum manerium, &c. in manus domini Regis seisiatur, et eidem Principi tanquam membrum et parcell' ducatus prædicti juxta formam et effectum dictorum doni, concessionis, et unionis præfati avi domini Regis, habendum et tenendum, liberetur. And that record was delivered by the Chancellor into the King's Bench (Gascoigne being then Chief Justice) and thereupon Margaret pleaded the grant of King Richard the Second, to her for life, and prayed in aid of the King; and had it, &c. and the Court gave day, &c. And the Prince at* the day brought a Procedendo in loquela, dum tamen ad judicium reddendum domino Rege inconsulto nullatenus procederetur: and thereupon Margaret made default, and thereupon day is given by the Court to the Prince, &c. At which day the Prince brought a (c) Pro-

(a) 2 Saund. 25.
Hil. 6 H. 4. in
Banco Regis,
Rot. 68.

(b) 2 Saund. 25.

[* 23 b.]

(c) 2 Saund. 25.
26.

cedendo ad iudicium, upon which the Court gave judgment as follows: *consideratum est, quod literæ prædictæ in forma præd' factæ revocentur et adnullentur, et quod dictum manerium, &c. in manus domini Regis seisiatur, et eidem Principi tanquam membrum et parcell' ducatus præd' juxta formam et effectum dict' doni, concessionis et unionis præfati avi dicti Regis, habendum et tenendum liberetur.* And in Mich 30 Hen. 8. in memorandis Scaccarii. Rot. 16. the record saith, *ad Parliament' 11 E. 3. tent' inter alia ordinatum et inactitatum fuit, quod comit' Cornubiæ imperpetuum moraretur ut ducatus fil' senior' Regum Angliæ qui essent hæredes propinquiore regni absque aliquo modo donari, &c.* And there is no opinion in law against it; for the case in 1 Mar. 94. a. b. Dyer, is such (the record of which I have seen, which is entered Trin. 7 E. 6. Rot. 303.) In replevin by Thomas Chafine, Esq. against the Lord Stourton, for taking, &c. at Mere in the county of Wilts: the defendant did avow for damage-feasant; and because the place where doth contain 200 acres of land, whereof King* H. 8. was seised in fee and 35 H. 8. demised to one Pyster for years, who granted it to the Lord Stourton; in bar of which avowry, the said plaintiff Chafine pleaded, *Quod dominus Edward' quondam Rex Angliæ tertius, progenitor domini Regis nunc, fuit seisitus de manerio de Mere in comitatu prædicto unde et cætera, in dominico suo ut de feodo in jure Coronæ suæ Angliæ, et sic inde seisitus existens, ad*

et adnullentur, et quod dict' manerium, &c. in manus dom' Reg' seisiatur, et eid' Principi tanquam membrum et parcell' ducatus præd' juxta form' et effectum dictorum doni, concessionis, et unionis præfati avi dict' Reg' habend' et tenend', liberetur. Et in Mich. 30 H. 8. in memorand' Scaccar' rot' 16. Record' dicit ad Parl' 11 Ed. 3. tent', inter alia, *ordinat' et inactitat' fuit, quod com' Cornub' imperpet' moraretur et Ducatus fil' senior' Reg' Angliæ qui essent hæredes propinquior' reg' absque aliquo modo donari, &c.* Et in lege nulla est opinio contra hoc: casus enim an. primo Mar' fol. 94. Dyer, est (cujus record' ego vidi, quod intratur Trinitat' 7 Edw. 6. rot' 303.) In replegiar' per Thom' Chafine Armigerum, versus Domin' Stourton pro captione, &c. apud Mere in comitatu Wilts, defendens facit advocacionem pro damno facto, et pro eo quod locus ubi, &c. continent 200 acras terræ, de quibus Rex Henric' 8. fuit seisitus in feodo, et anno 35 ejusdem H. 8. dimisit cuidam Pyster pro annis, qui eos concessit Dom' Stourton: in barram cujus advocacionis dict' Chafine quer' placitat, *Quod dominus Edward' quondam Rex Angliæ tertius, progenitor domini Reg' nunc, fuit seisitus de manerio de Mere in comitatu præd' unde, &c. in domin' suo ut de feodo in jure Coronæ suæ Ang' et sic inde seisitus existens, ad Parliament' suum tentum apud Westm', in com' Middlesex, die Lunæ proxim' post fest' S. Matthiæ Apostoli, anno regni sui 11. inter cætera, per assensum omnium tam Prælatorum, Comitum, Ba-*

[* 24 a.]

ronum, et alior', quam gentium de communitat', accordatum fuit, quod pro honore dict' nuper Regis et terr' suæ, et ad fortificationem ejusdem, et pro eo quod ex antiquo esset unus Dux Cornubiæ quod dictus quondam Rex præficeret dominum Edward' filium suum adtunc Comitem Cestriæ, Ducem Cornubiæ, et quod filius senior regem Angliæ, videlicet, illi qui essent proximi hæredes de regn' Angliæ, essent Duces Cornubiæ, quod dictus comitatus datus esset dicto domino Edwardo in nomine ducatus, et quod dictus comitatus Cornub' imperpetuum moraretur ut ducatus filiorum seniorum Regum Angliæ qui essent proximi hæredes regni absque aliter donat' existen', prout in eodem actu', inter alia, plenius continetur: posteaque prædictus nuper Rex Edwardus tertius seisisus existens de præd' maner' de Mere cum pertinentiis unde, &c. in dominico suo ut de feodo et jure, ut in jure coronæ suæ Angliæ, per literas suas patentes, quarum dat' est apud Westmonaster' xvii. die Martii anno regni sui undecimo, et in curia hic prolat', recitans per easdem, quod cum nuper personam dilecti et fidelis ipsius nuper Regis Ed' tunc Comitis Cestriæ filii sui primogeniti honorare volens: eidem filio suo nomen et honorem Ducis Cornubiæ dederit, ipsumque in Ducem Cornubiæ præfecerit, et gladio cinxerit, ut deceret, dederit et concesserit, et per easdem literas suas patentes pro se et hæredibus suis confirmaverit, eidem filio suo sub nomine et honore Ducis dicti loci, inter alia, prædictum manerium de mere cum pertinentiis: habendum et te-

Parliamentum suum tentum apud Westmonast' in comit' Middlesex', die Lunæ proxim' post festum Sancti Mathiæ Apostoli, anno regni sui undecimo, inter cætera, per assensum omnium tam Prælatorum, Comitum, Baronum, et aliorum, quam gentium de communitate, accordatum fuit, quod pro honore dicti nuper Regis et terr' suæ, et ad fortificationem ejusdem, et pro eo quod ex antiquo esset unus Dux Cornubiæ, quod dict' quondam Rex præficeret dominum Edward' filium suum adtunc Comit' Cestriæ, ducem Cornub', et quod filius senior Regum Angl', videlicet, illi qui essent proximi hæred' de regno Angliæ, essent Duces Cornub', et quod dictus comit' dat' esset dicto domino Edwardo in nomine ducat', et quod dict' com' Cornubiæ imperpetuum moraretur ut Ducatus filiorum seniorum Regum Angliæ qui essent proximi hæredes regni absque aliter donat' existen', prout in eodem actu inter alia plenius continetur: posteaque prædictus nuper Rex Edwardus 3. seisisus existens de præd' maner' de Mere* cum pertinentiis unde, &c. in dominico suo ut de feodo et jure, ut in jure coronæ suæ Angliæ, per literas suas patentes, quarum dat' est apud Westmonasterium xvii. die Martii anno regni sui undecimo et in curia hic prolat', recitans per easdem, quod cum nuper personam dilecti et fidelis ipsius nuper Regis Edward' tunc Comitis Cestriæ filii sui primogeniti honorare volens, eidem filio suo nomen et honorem Ducis Cornubiæ dederit, ipsumque in Ducem Cornubiæ præfecerit, et gladio cinxerit, ut deceret, dederit et concesserit, et per

[* 24 b.]

easdem literas suas patentes pro se et hæredibus suis confirmaverit, eidem filio suo sub nomine et honore Ducis dicti loci, inter alia prædictum manerium de Mere cum pertinentiis : habendum et tenendum eidem nuper Duci, et ipsius et hæred' suorum Regum Angliæ filiis primogenitis, dicti loci ducibus, in regno Angliæ hæreditarie successur' : quod quidem manerium cum pertinentiis idem nuper Rex Edward' 3. prædicto ducatu pro se et hæredibus suis per prædictas literas patentes, inter alia, annexit et univit eidem imperpetuum remansur', ita quod, &c. And further pleaded the cause of revivification, as in the charter : by force of which act, and of the said letters patent, the said Edward the Prince fuit seisisus de manerio prædicto, inter alia eidem ducatu unit' et annex' et ejusdem ducatus parcell' in dominio suo *ut de feodo ut feodo et jure : and afterwards the said Prince Edward died, by which King Edward 3. was seised of the said manor in fee, and that he died, and the same descended to King Henry the Eighth, ut consanguineo et hæredi ipsius Ed. 3. and afterwards King Henry 8. had issue Edward 6. his first begotten son, by which he was Duke of Cornwall, &c. And afterwards King Henry 8. made the lease to Pyster, prout, &c. and afterwards King Edward 6. anno 4. demised the said two hundred acres to Chafine for one and twenty years, upon which it was demurred in law. And because the said charter of King Edward 3. was pleaded (without authority or force of Parliament) there it seemed

[* 25 a.]

nendum eidem nuper Duci, et ipsius et hæredum suorum Regum Angliæ filiis primogenitis, dicti loci ducibus, in Regno Angliæ hæreditarie successur' ; quod quidem manerium cum pertinentiis idem nuper Rex Edward' Tertius prædicto ducatu pro se et hæredibus suis per prædict' literas patentes, inter alia, annexit et univit eidem imperpetuum remansur', ita quod, &c. Et ulter' placitat clausulam revivificat' prout in charta : virtute cujus act' et dict' literar' patent' dict' Princeps Edw' fuit seisisus de manerio præd' inter alia, eidem Ducatu unit' et an' et ejusdem Ducat' parcell' in dom' suo ut de feodo et jur'. Et post' dict' Prin' Ed' obiit per quod Rex Ed. 3. fuit seisit' de dicto manerio in feodo : et quod ille obiit, et idem manerium descendebat Regi H. 8. consanguineo et hæredi ipsius E. 3. Et postea Rex H. 8. ut exitum habuit E. 6. filium suum primogenitum, per quod ille fuit Dux Cornubiæ, &c. Et postea Rex H. 8. fecit dimissionem dicto Pyster prout &c. Et postea Rex Ed. 6. an' 4. dimisit dictas 200 acras dict' Chafine pro 21 annis. Super quo partes morabant in lege ; et quia dict' charta Reg. E. 3. placitabat' sine autoritate seu vi Parliam', ibid' videbat' primo quod Princeps non habuit nisi statum ad voluntatem : 2. Quod Rex non potuit unire et annectere dict' manerium dicto ducatu per literas patentes absque autoritate Parliamenti, et idem facere parcellam ducat', et mutare formam et cursum ducat' : 3. Per mortem Ducis Cornubiæ manerium illud ad Regem devenit ut eschaeta pro defectu Ducis et primogeniti filii, et deinde an-

nexum fuit et reunit' coronæ loco dom', et per nativitatem alicujus alius filii non potest separari, &c. Et totum hoc movebat' tantum per jurisconsultum; liber enim est, Et Justic' noluerunt arguere istum casum, ut credo, propter pregnantiam Mariæ Reginae. Si vero dict' opinio admitteretur, nihil tamen probat' cont' hanc determinationem'; dict' enim actus in placito memorat' nihil transfert, sed chartam oportet dictum manerium transferre; et tali modo transf' non potuit sine auctoritate Parl' neque char' tantum dictum manerium' ut parcell' ducatus annectere potuit: et chart' non placitata fuit fieri auctoritate Parl'. Et quoad opinionem in casu de Alton Woods in prima mearum Relationum parte, ibidem etiam admittitur, quod dicta concessio fuit per chartam tantum.

4. Probatur judiciis et determination' in Parliam' quod dict' charta creationis habet auctoritatem et vim Parliam': ex rot' Parl' an' 5 H. 4. judicio in Parl' reddito versus Johan' Cornwall mil' et uxorem ejus Comitissam de Huntingdon', de quibusdam maner' (quæ il' habuit) ducatu Cornubiæ pertinet, et eidem annexis:

1. That the Prince had but an estate at will. 2. That the King could not unite and annex the said manor to the said duchy by letters patent without authority of Parliament, and make it parcel of the duchy, and to alter the form and course of the duchy. 3. Per mortem Ducis Cornubiæ, the manor came to the King as an escheat for want of a duke and first begotten son, and was then knit and rejoined to the crown in lieu of the seignior, and by the birth of any other son it could not be severed, &c. And all that was moved only by one of the counsel; for the book saith, Et justic' nolu' arguere istu' casu' ut credo, propt' pregn' M. Reg'. But if the said opinion should be admitted, yet it proves nothing against this reason, for by the said *act mentioned in the plea nothing passes, but the charter ought to pass the said manor, &c. and the same cannot pass in such manner without authority of Parliament, nor can the charter alone annex the said manor to be parcel of the duchy, and the charter was not pleaded to be made by authority of Parliament. And as to the opinion in the case of Alton Woods, in the First Part of my Reports, it is there also admitted that the said grant was only by charter.

4. It is proved by judgments and resolutions in parliament that the said charter of creation hath the authority and force of Parliament; 1. Ex Rot' Parliam' anno 5 Hen. 4. a judgment given in Parliament against Sir John Cornwall and his wife Countess of Huntingdon, for certain manors which she had of the

[*25 b.]

That the said charter of creation has the authority of Parliament is proved by judgments and resolutions in Parliament.

duchy of Cornwall, and which were annexed to it: also by the act of 33 H. 6. which see inter originalia de 35 H. 6. rot' 29. ex remem' Thesaurar' in Scaccario: et ex rot' Parliam' de 9 H. 5. where it is resolved and affirmed by both acts of Parliament, that the said King Edward 3. by his charter 17 Mar. an' 11 E. 3. of the common assent and counsel of the prelates, Earls, barons, and others of his council in his Parliament gave, &c. as in the charter. And it is provided by the same act of Parliament of 9 H. 5. that the manor of Isleworth, which was annexed by the said charter, &c. should be

[* 26 a.] *severed and disannexed; in which two things were observed: 1. That the said charter of King Edward 3. hath the authority and force of Parliament. 2. That the said manor of Isleworth was so annexed, &c. that it could not be suffered or disannexed but by act of Parliament: and all this is likewise affirmed by another act of Parliament, anno 30 Hen. 6. ex rot' Parliamenti. *Vide* the act of 3 Ed. 4. ex rot' Parliamenti, and the act of 22 Ed. 4. ex eodem rot' of a very long exchange between the King and the Earl of Huntingdon, which act is revoked by an act made 11 H. 7. And see the act of 1 H. 7. ex rot' Parliamenti of the same year, (part of which is pleaded by Hele Serjeant, and Warwick Hele) by which it is enacted, that Henry 7. should have and hold the dukedom of Cornwall, &c. to him and his heirs, in as large and ample manner and form, &c. as the Kings Henry 6. or Edward 4. or any of them enjoyed

actu etiam de an' 33 H. 6. quem vide int' originalia de 35 H. 6. rot' 29. ex remem' Thesaur' in scaccario; et ex rot' Parliam' de anno 9 H. 5. ubi determinatum et affirmatum fuit per utrosque actus Parliamenti, quod dictus Rex Ed. 3. per chartam suam 17 die Martii anno 11 Ed. 3. de communi assensu et concilio Prælatorum, Comitum, Baronum, et aliorum, de suo concilio in Parliamento suo, dedit, &c. prout in charta. Et provisum est per eundem actum Parliamenti de anno 9 H. 5. quod manerium de Isleworth, quod per dict' chart' annectebatur, &c. rursus separaretur et disjungeretur, &c. in quo res duæ observatæ fuerunt: 1. Quod dict' charta Regis E. 3. habet auctoritatem et vim Parl': quod dictum manerium de Isleworth sic annectebatur, &c. quod separari seu disjungi non potuerat, si non per actum Parliamenti. Et totam hoc affirmatur etiam per alium Parliam' actum anno 38 H. 6. ex rot' Parl'. *Vide* actum de 3 E. 4. ex rot' Parliam', et actum de 22 E. 4. ex eodem rot' de excambio quodam prælongo inter Regem et Comitem de Huntingdon, qui act' revocatur per quandam actum anno 11 H. 7. editum. Et vide actum de 1 H. 7. ex rot' Parliamenti de eodem anno (pars cujus placitatur per Hele Servientem ad Legem et Warwic' Hele) per quem inactitatum est, quod Rex Hen. 7. haberet et teneret ducatum Corn', &c. sibi et hæredibus suis in tam amplo et largo modo et forma, &c. prout Reges H. 6. vel E. 4. aut eorum alter, gavisii fuerunt dict' maneria, &c. sed omiserunt hanc subsequenter clausulam, scil. And be

it also ordained and established by the same authority, that whensoever our sovereign lord, by the grace of God, have first a son of his body lawfully begotten, that the same son and Prince have and enjoy the said duchy of Cornwall, &c. in as ample and large form and manner as any Prince first begotten son of any King hath had or enjoyed before this act. Et totum hoc quod dictum fuerit, determinatum est et affirmatum per autoritat' Parl' anno 32 Hen. 8. memorati in breve de Scire facias. Unde determinat' fuit per dominum Cancellar' et dictos Justiciarios, quod dicta charta in se habet autoritat' et vim actus Parlamentarii.

Quoad secundum articulum determinat' fuit, quod dict' charta, in se habens autoritat' et vim Parl' sufficiens est ex seipsa sine aliquo alio actu; et breve hoc de Sci' fac' quod Rex protulit, si materiam in se habeat sufficient', non cadet ob redundantia' nulli momenti. Vide 4 H. 6. f. 16 b. 45 E. 3. 6 a. et 40 Ass. pl. 26. Vide actum ante dictum de anno 9 H. 5. ibidem enim affirmatur per totum Parlamentum, quod ad Parlament' tent' apud Westm' die Lunæ proxim' post festum Sancti Matthiæ Apostoli, an' regni Regis Ed. 3. 11. inter alia, accordatum fuit, quod filii seniores Regum Angl' scilicet, illi qui essent proxim' hæredes Regni Angliæ, esset Duces Cornub' : et quod com' Cornubiæ imperpetuum moraretur ut ducatus filiorum seniorum Regum Angliæ qui es-

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the said manors, &c. but they omitted this subsequent clause, scilicet, "And be it also ordained and established by the same authority that whensoever our sovereign lord, by the grace of God, have first a son of his body lawfully begotten, that the same son and Prince have and enjoy the said duchy of (a) Cornwall, &c. in as ample and large form and manner as any Prince first begotten son of any King hath had or *enjoyed before this act." And all that which hath been said is resolved and affirmed by authority of Parliament, anno 32 H. 8. mentioned in the Scire facias; wherefore it was resolved by the Lord Chancellor, and the said Justices, that the said charter hath the authority and force of an act of Parliament.

As to the second point it was resolved, that the charter having the authority and force of Parliament is sufficient in itself, without any other act; and if the King's Scire facias hath sufficient matter, it shall never abate for surplussage not material. Vide 4 H. 6. 16 b. 45 E. 3. 6 a. 40 Ass. pl. 26. Vide the act of 9 Hen. 5. for there it is affirmed by the whole Parliament, that at the Parliament held at Westminster, the Monday next after the feast of Saint Matthias the Apostle, in the 11th year of the reign of King Edward the Third amongst other things, it was agreed, that the Eldest sons of the Kings of England, scilicet, those who should be next heirs to the realm of England, should be Dukes of (b) Cornwall, and that the county of Cornwall should always

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(a) 1 Bulst. 133.

[* 26 b.]

2. The charter is sufficient in itself; if the King's scire facias hath sufficient matter, it shall never abate for surplussage not material.

(b) 1 Bulst. 133.

[* 27 a.]

The Prince
hath an estate
in fee-simple
in the duke-
dom.

Co. Lit. 27 a. b.

He who ought
to inherit
ought to
be the first
begotten son
of the heirs of
the Black
Prince. Vid.
note (m) *post*
p. 198.

remain as a duchy to the eldest sons of the Kings of England who shall be next heirs to the said realm, without being given elsewhere. And thereupon King Edward by his charter 17 Martii then next following, of common assent and counsel of the Prelates, Earls, Barons, and others being of his council in the said Parliament, gave, &c. but the court relied on the King's charter, with the authority and assent of Parliament; for that of itself is sufficient.

As to third point it was resolved, that the Prince hath an estate in fee-simple in the said dukedom: for every estate of inheritance is either fee-simple or fee-tail; and this is not an estate-tail, for it is not limited or restrained either by express words, or by any that are tantamount, to the heirs of the body of the Prince; for the gift is to the said Prince, et ipsius et hæred' suorum Regûm Angliæ filiis primogenitis. So that he who ought to inherit ought to be the first begotten son of the heirs of the Black Prince, be he heir lineal or collateral; but such heir ought to be King of England. Which manner of limitation of the estate was short, excellent, and curious: for to raise the estate of inheritance these essential words (his heirs) were not omitted, although afterwards they were qualified, as by the limitation appears. And that this was an estate of inheritance, is proved by the said record of 50 Edward 3. by which it appears, that the wife of the Black Prince was endowed (κ). And it appears

sent proxim' hæredes dicti Regni, absque aliter donat' existen': et super hoc Rex idem Edwardus per chartam suam 17 die Martii tunc proxim' sequent' de com' assensu et consilio Prælatorum, Comitum, Baronum, et aliorum, de consilio suo in dicto Parliam' existentium, dedit, &c. curia vero iudicium suum fundarunt super chartam Regis cum autoritat' et assensu Parliament': quæ de se ipsa sufficit.

Quoad tertium articulum, determinatum, fuit quod Princeps habet statum de feodo simplici in dicto ducatu: omnis enim stat' hæreditarius, est aut feodu' simplex, aut feodum talliatum, et status hic non est talliatus, non enim limitatur vel restringit', verb' sive expressis sive æquipollentib' hæredib' de corpore Principis, donatio enim est, Principi et ipsius et hæredu' suorum Reg' Angl' filiis primogenitis, ita quod illum, qui hæreditabit, oportet esse filium primogenitum hæred' Principis Nigri, hæres sit ille linealis sive collateralis talem vero hæredem oportet esse Reg' Angl': qui modus limitationis status fuit brevis, excellens, et accuratus: ad creandum enim statum hæreditarium, hæc verb' essentialia (*scilicet*, hæredib' suis) non omissa fuerunt, quamquam subinde temperata fuerunt et modificata, ut per ipsam limitationem apparet: et quod hic status fuit hæreditarius, per dictum recordum anno 50 E. 3. probatur, ex quo liquet uxorem Principis Nigri fuisse dota-

(κ) Acc. *Attorney-General v. Bishop of London*, 4 Mod. 215.

tam. Et constat ex libro de anno 21 Edw. 3. 41. quod Princeps in dicto manerio de Berkhamstead (parcell' dict' ducatus Cornub') habuit feodum. Et dict' ill' judicia in annis 5 et 6 H. 4. hoc probant; ib' enim generaliter judic' redditur quod literæ patentes revocentur et adnullentur, &c. quod judic' reddi non potuerat, si aliquis status, vel reversio, vel possibilitas, manet illi cui factæ fuerunt literæ patentes; tunc enim literæ illæ patentes non adnullarentur, sed judicium esset, quod literæ patentes vacuæ sint et adnullatæ quoad statum Principis. Liqueat etiam per liberationem in anno 33 H. 6. ex rot. Parliament', et per actum Parliamenti anno 38 H. 6. ex eodem rot', quod Edwardus senior filius Regis H. 6. had his livery as inheritable by descent, due to him by birthright. Et sic habuit Edw. primogenitus filius Edw. 4. et Arthur' filius primogenitus H. 7. quibus facta fuit liberatio dicti ducatus, qui ad illos spectabat jure hæreditario. In anno 22 E. 4. ex Rot' Parliam' in dicto excambio prælongo inter Reg' et Comitē de Huntingd', Princeps adjudicatur fore seisisus de ducatu Cornub' in feodo simplici. Et sic fuit unanimi assensu determinatum per Dominum Cancellarium et dictos Justiciarios, quod Princeps habet feodum simplex per descensu' in honore, et possessionibus dicti ducatus.

Quoad articul' 4. determinatum fuit quod contra generalem actum, Parliam' vel

against a general act of

by the book of 21 Edw. 3. 41. that the *Prince, in the said manor of Berkhamstead (parcel of the said duchy of Cornwall) had fee. And the said judgments in 5 and 6 H. 4. prove it; for there judgment generally is given, that the letters patent should be revoked and made void, &c., which judgment could not have been given, if any estate or reversion, or possibility, did remain in the patentee, for then the letters patent should not be made void, but the judgment should be, that the letters patent should be made void and annulled as to the estate of the Prince. Also it appears by the livery in 33 Hen. 6. ex rot' Parl', and by act of Parliament 38 H. 6. ex eodem rot', that Edward, eldest son of Hen. 6. had his livery as inheritance by descent due to him by birthright; and so had Edward, the first begotten son of Edward 4.; and Arthur, the first begotten son of Hen. 7., to whom livery was made of the said duchy, which belonged to them jure hæreditario. In anno 22 E. 4. ex rot' Parliament', in the said long exchange between the King and the Earl of Huntingdon, there the Prince is adjudged to be seised of the duchy of Cornwall in fee-simple; and so it was unanimously resolved by the Lord Chancellor and the said Justices, that the Prince hath a fee-simple by descent, in the honour and possessions of the said duchy.

As to the 4th point it was *resolved, † that against a general act of Parliament, or such

[* 27 b.]

Nul tiel record cannot be pleaded
[* 28 a.]
Co. 76 a. b.

† Co. Lit. 260.
If misrecited,
the party ought
to demur.

§ Cr. Car. 355.

This act is such
an act, whereof
the Judges and
all the king-
dom ought to
take notice.

|| 4 Co. 77 a.
Hob. 226.
Doct. pla. 338.
Plow. 231 a.
Vin. Ab. Stat.
C.
Bac. Ab. Stat. I.
Com. Dig. Parl.
R. 6.
Hales. Hist. C.
L. 15.

¶ Hob. 226.
[*28 b.]

an act whereof the Judges ex officio ought to take notice, the other party cannot plead Nul tiel record; for of such acts the Judges ought to take notice: ‡ but if it be misrecited, the party ought to demur in law upon it (u). And in that case the law is grounded upon great reason; for God forbid if the record of such acts should be lost, or consumed by fire, or other means, that it should tend to the general prejudice of the commonwealth; but rather, although it be lost or consumed, the Judges, either by the printed copy, or by the § record in which it was pleaded, or by other means, may inform themselves of it. See Partridge and Croker's case, &c. Plowd. Com. fol. 78.

|| And it was resolved that this act, which concerns the King, and the Prince, who is the first begotten son of the King, and heir apparent to the crown for the time being, perpetualis futuris temporibus, is such an act whereof the Judges and all the kingdom ought to take notice: for every subject hath an interest in the King, and none of his subjects, who is under his laws, are divided from him, being their head and sovereign, so that the King's affairs and concerns touch the whole kingdom, and especially ¶ when they regard the Prince, *the first begotten son of the King, and heir apparent to the crown, coruscat enim Princeps radiis Regis patris sui, et censetur una persona cum ipso Rege, as it

talem qualis notitiam Judices ex officio debent habere, pars altera non potest placitare nullu' tale recordum, horum enim actuum Judices debent notitiam habere: si vero male recitatur, pars potest morari in lege super hoc. Et in hoc casu lex summa fundatur ratione; absit enim, si recordu' hujusmodi statuti perderet' vel consumeret' igne vel alio modo, quod hoc tenderet in generale reipublicæ prejudicium; immo potius, quamvis perdatur vel consumat', Judices, vel ex impressione typographica, vel ex recordo in quo placitat' fuit, vel alio modo, possint seipsos de hoc informare. Vide casus de Partridge et Croker, &c. in Commentar' Plowd. fol. 78.

Et determinatum fuit, quod hoc statutum de Rege, et de Principe, qui est filius primogenitus Reg' pro tempore existentis, et hæres apparens coronæ, perpetualis futuris temporibus est hujusmodi act', cujusmodi Judices et totum reg' debent habere notitiam: omnis enim subdit' interesse habet in Rege, et null' subditorum (qui infra leges ejus est) dividitur ab illo, suo Capite et Domino supremo: res itaque, et negotia Regis, ad totum spectant regnum, et præcipue quando aguntur de Principe, filio primogenit' Reg', et hærede apparente coronæ, coruscat enim Princeps radiis Regis patris sui, et censetur una persona cum ipso Rege, ut dict' est in actu Parliam' de an. 38 H. 6. Et proinde, si

(L) Vid. note (c) *Holland's case*, Vol. II. p. 474.

aliquis intendit mortem Principi, et hoc aperta declarat' actione, est crimen læsæ Majestatis, per antiquas communes Angl' leges, et sic declarat' per statut' de an. 25. E. 3. 1 H. 5. fol. 7. b. Si Princeps, ut Princeps Walliæ, judicium habet recuperandi, et postea corona illi descendit, ille, ut Rex, prosequetur' executionem. Et cum ratione hujus determinat' in hoc articulo concordat regula cur' in Comment' Plowd' in casu Dom' Berkley, f. 231. quod statut' de an. 35 H. 8. de capacitate Reg', tal' est act', qualis Judices debent notitiam habere, quia ad uxorem Regis spectat: et eadem ratione in hoc casu de Principe. Accordatum etiam fuit, si nullum tale recordum admitteretur ut placit' in hoc casu, quod substantia et effect' recordi sufficiens ad manutenend' dict' breve de Scire facias, apparet in recordo exemplificato sub magno sigillo. Determinat' etiam fuit, quod actus de anno 43 Eliz. de confirmatione literarum patent', placitatus per Hele Servientem ad Legem, et Warwicum ejus filium, non se extendit ad hunc casum, duas ob rationes manifestas. 1. Eo quod act' ille supplet tantum quosdam defect' particulares, ut male nominationem maneriorum, &c. male recitationem, vel non recitationem dimissionum, &c. et alias imperfectiones speciales in ill' actu memoratas: 2. Act' idem facit literas patent' in lege validas tantum contra Regem hæredes et successores suos, cum exceptione omnibus aliis, ideoque sine dubio jus Principis in hoc casu ligari per

is said in the act of Parliament of 38 H. 6. And therefore if any one intends the death of the Prince, and declares it by open act, it is high treason, by the ancient common laws of England, and so declared by the statute of 25 Edw. 3. 1 Hen. 5. 7 b. If the Prince, as Prince of Wales, hath judgment to recover, and afterwards the crown descends to him, he, as King, shall sue execution. And with the reason of this resolution in this point agreeth the rule of the court in Plowd. Com. in the Lord Berkley's case, 231, that the act of 35 Hen. 8. which concerns the capacity of the Queen, was such an act, whereof the Judges ought to take knowledge, because it concerns the King's wife; and by the same reason in this case of the Prince. And it was agreed, that if Nul tiel record should be admitted to be pleaded in this case, that the substance and effect of the record sufficient to maintain the said Scire facias appears in the record exemplified † under the great seal. It was also resolved, that the act of 43 El. of confirmation of letters patent pleaded by Hele Serjeant, and War. Hele his son, doth not extend to this case for two manifest reasons. 1. Because the act supplies only certain* particular defects, as misnomer of the manors, &c. misrecital or non-recital of leases, and other special imperfections mentioned in the act. 2. The act makes the letters patent good only against the King, his heirs and successors, with a saving to all others, and therefore without question, the right

Intending the death of the Prince, evidenced by overt act, is treason

If the Prince as Prince has judgment, when King he shall sue execution.

The act 35 H. 8. a public act.

† Hob. 226.

If nul tiel record could be pleaded, there is sufficient to maintain the Scire facias.

‡ Co. Lit. 225 b. The act 43 El. of confirmation of letters patent does not extend to this case. 1. Because the act supplies only particular defects.

[* 29 a.]

2. The act makes the letters patent good only against the King, his heirs and successors, with a saving to all others.

of the Prince in this case cannot be bound thereby: and that the act of 1 H. 7. which Hele Serjeant, and the said Warwick have pleaded, ut amici curiæ to inform the Court of the truth, avails them not; for it is thereby enacted, that King Henry VII. shall have to him and his heirs the said duchy, &c. in as ample and large manner as H. 6. or E. 4. had it; which words of reference preserve the duchy of Cornwall according to the limitation of creation by the said charter of 11 E. 3. But in truth the Serjeant and his son have not performed the office of a friend or of a good informer, for they have omitted one clause in the same act which expressly concerns the preservation of the said duchy of Cornwall to the first begotten son of the King, &c. and have thereby endeavoured to deceive the Court, and suppress the truth. And, lastly, it was resolved, that (in such Scire facias brought by the King to repeal letters patent made of any parcel of the said duchy, to the end that the King may make *livery to the Prince) the King or the Prince may reply to any bar pleaded by the defendants; and both ways are good in law: but the better form is, that the King's Attorney, till livery be made, should reply.

The non obstante cannot take away the force of the said acts of parliament.

J. H. and W. H. as amici curiæ have endeavoured to suppress the truth by omitting one clause of the act, 1 H. 7.

The King or the Prince may reply to any bar pleaded by the defendants: but the better form is, that the King's Attorney, till livery be made, should reply.

The non obstante cannot take away the force of the said acts of parliament.

hunc non potest. Et quod statutum de an' 1 H. 7. quod Hele Serviens ad Legem, et dic' Warwick placitaverunt, ut amici curiæ, ad informandum curiam de veritate, non eis affert aliquod auxilii: per hoc enim inactatum est, quod Rex H. 7. haberit sibi et hæredibus suis dictum ducatum, &c. in tam amplo et largo modo prout H. 6. vel E. 4. habuit: quæ verba relationis præservant ducatum Cornub' secund' limitationem creationis per dict' chartam de an' 11 E. 3. Revera autem Serviens ille ad Legem et fili' ej' non functi sunt officio amici, vel probi relator'; pretermiserunt enim clausulam in eodem statuto expresse spectant' ad præservand' dict' ducat' Cornub' fil' primogenito Regis, &c. et isto modo moliti sunt in cur' decipiend' et veritat' suppressend'. Determinat' denique fuit, quod (in hujusmodi brevi de Scire facias per Regem lato ad repellendas literas patentes factas de aliqua parcella dicti ducatus, ea nimirum intentione ut Rex liberationem faceret Principi) Rex vel Princeps potest replicare ad barra' aliquam per defendentes placitam; et utraque genera sunt in lege valida; melior vero formula est, quod Attornatus Reginus, quousque liberatio facta sit, replicaret, ut in casu ad barram. Et quoad clausulam de Non obstante in literis patent' Reg' El. determinatum fuit, quod non potest vim tollere dicto' statutor' Parl' nec prejudicium esse Prin' qui nunc est, de jure suo in dicto ducatu.

(1.) By the Bill of Rights 1 W. and M. it was declared, that from the then session of par-

In hoc casu res diversæ observat' fuerunt. 1. Quod filius primogenitus uniuscujusque Regis postdict' creationem fuit Dux Cornub', et sic approbatus, ut Hepr' de Monmouth, primogenitus filius H. 4. et Hen. de Windsor primogenitus filius Reg' Hen. 5. et Edw. de Westm' primogenitus filius Reg' Hen. 6. et E. de Westm' filius primogenit' Reg' E. 4. et Arthurus de Winchester primogenitus filius Regis H. 7. et Ed. de Hampton fil' primogenitus Reg' Hen. 8. Et hi omnes gavisī sunt titul', honor', et possessionibus dicti ducatus Cornubiæ; ita quod possessio semper fuerit, sine interruptione, primogenit' filiis Reg', omni tempore post dictam creationem in anno undecimo Edwardi 3. qui circa annos est trecentos, ita quod post illam creationem non unquam fuit filius primogenitus alicujus Reg' quin Dux fuerit Cornub'. 2. Quod Richardus de Burdeaux qui filius fuit Principis Nigri, non fuit Dux Cornub' vi dict' creationis: quanquam enim post patris sui obitum hæres coronæ fuit apparens, eo tamen quod non fuit filius primogenit' alicujus Regis Angliæ (ejus enim pater obiit vivente Rege E. 3.) dict' ille Richardus non fuit infra limitationem de 11 Edw. 3. et hac de causa in ann. 50 E. 3. charta speciali creat' fuit Dux Cornubiæ. Neque Elizabetha, filia primogenita Regis Ed. 4. fuit Ducissa Cornubiæ, illa enim fuit filia primogenita Reg' et limitatio est, filio primogenito. Neque Rex H. 8. vivente suo

In this case divers things were observed:—1. That the eldest son of every King (since the said creation) has been Duke of Cornwall, and so allowed to be; as Henry of Monmouth, first begotten son of Henry IV. and Henry of Windsor, first begotten son of Henry V. and Edward of Westminster, the first begotten son of Henry VI. and Edward of Westminster, the first begotten son of Edward IV. and Arthur of Winchester, the first begotten son of Henry VII. and Edward of Hampton, the first begotten son of Henry VIII. And all these have enjoyed the style, honour, and possessions of the said duchy of Cornwall, so that the possession hath been always, without interruption, with the first begotten sons of the Kings, ever since the said creation, in 11 Edw. 3. which is about three hundred years: so that after the said creation there has been never a first *begotten son of any King, but he was Duke of Cornwall. 2. That Richard de Bourdeaux, who was son of the Black Prince, was not Duke of Cornwall by force of the said creation; for although after the death of his father he was heir apparent to the Crown, yet because he was not the first begotten son of any King of England (for his father died in the lifetime of King Edward III.) the said Richard was not within the limitation of 11 Ed. 3. and therefore in ann. 50 E. 3. he was created Duke of Cornwall by a special charter: nor was

The eldest son of every King has been Duke of Cornwall.

[* 30 a]

liament, no dispensation with any statute should be valid, unless such statute allows it, and except in such cases as should be

specially provided for the then session. Vid. *Hargrave's notes*, 3, 4. Co. Lit. 120 a.

Elizabeth, the eldest daughter of King Edward IV. Duchess of Cornwall, for she was the first begotten daughter of the King, and the limitation is to the first begotten son. Neither was King Henry VIII. in the life of his father, after the death of Prince Arthur his brother, by force of the said creation, Duke of Cornwall; for although he was the sole son and heir apparent of Henry VII. yet forasmuch as he was not the (a) first begotten son, he was not within the said limitation; for Prince Arthur was his first begotten son (M). 3. The great care and

patre post mortem Princip' Arthuri fratris sui, non fuit videtur creationis Dux Cornubiæ: quanquam enim ill' fuit solus filius et hæres apparens Regis Henrici 7. eo tamen quod non fuit filius primogenitus non fuit infra dictam limitationem; Princeps enim Arthurus filius fuit primogenitus. 3. Magna illa uniuscujusque Regis cura et respectus (a tempore dictæ creationis) præservandi dictum ducatum filio suo primogenito. Et post diversas continuationes, judicium reddebatur, prout sequitur:

He who is not the first begotten son is not within the limitation.

(a) F. N. B. 82 g.

(M) Lord Hardwicke in *Lomax v. Holmden*, 1 Ves. 294. remarks, "The case of the Duchy of Cornwall is direct: that the eldest son of the King of England, (and therefore Richard II. required a special grant) takes it as primogenitus; although Lord Coke, at the end of the Prince's case, 8 Co. says otherwise. But that was not the point there, being only an observation of his own, and has ever since been held a mistake of that great man. He was also mistaken in the fact in saying that Henry VIII. was not Duke of Cornwall, because not primogenitus; for Lord Bacon in his history of Henry VII. affirms the contrary, that the dukedom devolved to him upon the death of Arthur; and this is by a great lawyer, and who must have looked into it, as he was then Attorney or Solicitor-General. So was Edward VI. in his father's life, without a new creation, although the King's second son. Lord Ellesmere in his printed observations, (p. 5.) upon Lord Coke says, with some warmth, that Lord Coke split on this rock, in restraining it to primogenitus, and not to the first *pro tempore*, voluntarily without any occasion, or the concurrence of any judge. Selden, in his *Titles of Honour*, Vol. VI. 776, says, the eldest sons living are also Dukes of Cornwall; and that Prince Charles was Duke on the death of his brother appears from the records. Rym. Fæd. tom. 16, 792, he is so described in the patent creating him Prince of Wales. There is no act of parliament afterward, in the time of James I. creating him duke: nor can any doubt arise (as I at first thought) of his right thereto under the charter of 11 Edw. 3. from the act of

"James I. enabling him to lease part of the duchy lands; several acts being passed to enable the dukes for the time being so to do. Nor is it a satisfactory answer, that that case was founded on an act of parliament made on political views, and so different from the rules of common law; for the difference of that case from others is in the nature and form of the limitation of the kind of estate to be taken in the duchy, not in the persons to take. But I own I should not be quite satisfied to found my opinion upon this, for political reasons might have some weight. But this determination happens to be strictly agreeable to the rules of law, in cases of common persons: as appears from Fitz. N. B. 188, on the writ *De auxilio ad filium militem faciendum*; where he says that primogenitus then alive is sufficient, which is agreeable to Lord Ellesmere's observations; that Charles became primogenitus on the death of his brother without issue, which circumstance concurs here, for issue are considered as part of their father. This is an original writ where the phrase and language of the law is most critical and precise, and has been always construed with great strictness; and as it supports the intention of the testator, it is some satisfaction to find it warranted by the most respected authority, as that is. I have been furnished with the original case of the duchy printed in 1613, which is very scarce, where it appears to have been by the greatest men, with full assent of council, and the reason of the resolution at large; and Fitzherbert's *Nat. Brev.* is expressly mentioned and relied on there." But the other point deducible

Super quo visis et plenius intellectis omnibus et singulis præmissis per prædict' et fidelem consiliar' dicti domini Regis nunc Thomam Dominum Ellesmere Cancellar' Angliæ et per dictam cur' hic habitaque inde per eundem Dom' Cancellar' et dict' cur' hic matura et diligenti deliberat' et advisamento cum Johan' Popham milit' Capitali Justic' dicti dom' Regis nunc ad placita coram ipso dom' Rege tenend' assignat', Edward' Coke mil' Capitali Justic' ipsius dom' Regis de Com' Banco, Thom' Fleming milite Capitali Barone de Scaecario ejusdem dom' Reg' et David' Williams milite, uno Justic' dicti dom' Regis ad placita coram ipso dom' Rege tenend' assignat', videtur eidem Dom' Cancellar' et dictæ cur' hic, quod placitum præd' Johan' Hele, et Warwici Hele, per ipsos superius in barram placitat' ac materia in eodem placito content' minus sufficiens in lege exist' ad manutenend', quod præd' literæ patentes præd' nuper Reg' Elizabethæ, de prædict' maneriis de West Taunton, Trelowia, et Landalph præd', cum pertinent' in forma præd' fact', revocari et cancellari, aut quod maneria illa cum per-

regard of every King, from the time of the said creation, to preserve the said dukedom to his first begotten son. And after divers continuances the judgment was given as follows:—

*Whereupon all and singular the premises being seen, and fully understood by the well-beloved and faithful counsellor of the said lord the now King, Tho. Ld. Ellesmere, Chancellor of England, and by the said Court here, and mature and diligent deliberation and advisement being thereupon had by the same Ld. Chan. and the said Court here (together) with J. Popham, Kt. C. J. of the said lord the now King, assigned for pleas to be held before the lord the King himself, Edw. Coke, Kt. C. J. of the same lord the King of the (Court of) Common Pleas, Tho. Flemming, Kt. Ch. Baron of the Exchequer of the same lord the King, and David Williams, Kt. one of the Justices of the said lord the King, assigned for pleas to be held before the King himself, It seemeth to the said Ld. Chan. and to the said Court here, that the plea of the aforesaid J. Hele and War. Hele, by them above pleaded in bar, and the matter in the same plea contained, are not sufficient in law to maintain that the letters patent of the said late Queen Elizabeth of the aforesaid manors of West Taunton, Trelowia, and Landalph with their appurtenances made in the form aforesaid ought to be

[*30 b.]
Judgment.

Plea of J. H.
and W. H. in-
sufficient.

from the observations here made by Lord Coke, viz. that the eldest son of the King's eldest son will not inherit the duchy on the death of his father, but that the King shall hold it by reversion, has been since held good law, 1 Hale P. C. 125, 126, and has

been in fact recognized by the Legislature in passing the stat. 33 Geo. 2. c. 10., by which the King was enabled to grant leases of the duchy, notwithstanding he had a grandson then Prince of Wales, see Coll. Peers. 8th ed. 1768, p. 29.

Replication of
the Attorney
[* 31 a.]
General to the
plea of H. L.,
good.

revoked and cancelled, nor that those manors with their appurtenances ought not to be taken and seised into the hands of the said lord the now King as the said H. Hobart, Attorney-General of the said lord the King who sues, &c. hath for the same lord the King thereof (*i. e.* touching the same) above alleged, and that the aforesaid plea * of the said Henry Hobart, Attorney General of the said lord the now King by him for the said lord the King in manner and form aforesaid, (to the bar of the aforesaid Henry Lindley) above by replying pleaded, and the matters in the same plea contained are sufficient in the law to preclude the aforesaid Henry Lindley, from saying, that there is not any such record of any such act of Parliament of the aforesaid late King Ed. 3. made, nor any such record of the aforesaid charter by the same late King Edward 3. made by authority of the aforesaid Parliament, as in the aforesaid writ of Scire facias is thereof recited and specified, as the aforesaid Henry Hobart Attorney General of the said Lord the King, who sues, &c. for the same lord the King hath thereof above alleged: Therefore it is considered and adjudged by the said Lord Chancellor, and by the said Court here, by the advisement aforesaid, that the aforesaid letters patent of the aforesaid late Queen (Elizabeth) to the aforesaid Gellio Merick and Henry Lindley, made as aforesaid (as to the said manors of West Taunton, Trelowia and Landalph aforesaid, with the appurtenances) be revoked, vacated,

Therefore the
letters patent
of Queen Elizabeth
are adjudged to be
revoked, &c.

tin' in manus dicti dom' Reg' nunc capi et seisisri non debeant, prout præd' H. Hobart Attor' dicti dom' Reg' General' qui, &c. pro eod' dom' Reg' super' inde alleg'. Et quod præd' placitum præd' Hen. Hobart Attornat' dicti domini Regis nunc generalis, per ipsum pro eodem dom' Reg' modo et forma præd' (ad barram præd' Hen. Lindley) superius replicand' placitat', ac materia in eodem placito content', sufficien' in lege existunt ad præcludend' præfat' Hen. Lindley a dicendo, quod non habetur aliquod tale record' alicujus talis actus Parliam' præd' nuper Regis Edwardi tertii edit', nec aliquod tale record' præd' chartæ per eundem nuper Reg' Edwardum tertium auctoritate Parliam' prædicti confect', qual' in prædicto brevi de Scire facias inde superius recitatur et specificatur, prout præd' Henricus Hobart Attornat' dicti dom' Regis Generalis, qui, &c. pro eodem dom' Rege superius inde allegavit. Ideo consideratum et adjudicatum est per dictum Dominum Cancellar', et per dictam curiam hic, de advisamento prædicto, quod præd' literæ patentes prædict' nuper Regin' præfatis Gellio Merick et Hen. Lindley, ut præferitur fact' (quoad prædict' maner' de West Taunton, Trelowia, et Landalph prædict' cum pertinenti') revocentur, evacuentur, adnullentur, ac vacuæ et invalidæ et pro nullo penitus habeantur et teneantur. Ac etiam quod irrotulament' earundem (quoad eadem maneria) cassetur, cancelletur, et adnihiletur. Quodque maneria illa cum pertinentiis in manus dicti dom' Regis nunc capiantur et seisentur, ut ea

præfeto nunc Duci (Cornub')
 tanquam membrum et parcell'
 ducatus sui prædicti, secundum
 formam et effectum doni, con-
 cession', et unionis prædict'
 habendum et tenendum, per
 dictum dominum Regem nunc
 liberentur, &c.

and annulled, and had and
 held as void and invalid, and
 for a (mere) nullity; and also
 that the enrolment thereof
 as to the same manors, be
 quashed and annihilated, and
 that those manors with the ap-
 purtenances be taken and seis-
 ed into the hands of the said
 lord the now King, that *the
 same to the aforesaid now
 Duke (of Cornwall) as a mem-
 ber and parcel of his duchy
 aforesaid, to have and to hold,
 according to the form and ef-
 fect of the gift, grant, and u-
 nion aforesaid, may be by the
 said lord the now King de-
 livered, &c. (N).

[* 31 b.]

(N) That no costs are recoverable in a *scire facias* to repeal a patent prosecuted in the name of the King, vid. note (I. 1.). *Digge's case*, Vol. I. p. 407.

{ 32 a. }

CALYE'S CASE.

Pasch. 26 Eliz.

In the King's Bench.

CALYE'S
CASE.
Pl. VIII.—32 a.

If the horse of a guest at an inn be stolen, the innkeeper is not liable if the horse were put to pasture at the guest's request; otherwise if the innkeeper had put the horse to grass of his own head.

* If the goods of a neighbour, who lodges at the inn as a friend at the request of the innkeeper, be stolen, the innkeeper is not liable.*

* If a neighbour, who is no traveller, as a friend at the request of the innkeeper lodges there and his goods be stolen, &c. he shall not have an action.*

* An innkeeper is bound to answer for himself and for his family, for the chambers and stables; for they are *infra hospitium*.*

* It is no excuse for the innkeeper that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open.*

* Although the guest does not deliver his goods to the innkeeper to keep, nor acquaints him with them; yet, if they be carried away or stolen, the innkeeper is liable.*

* If the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged.*

* The innkeeper requires his guest to put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not: the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged.*

* The innkeeper's liability extends to all moveable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c.*

* If the guest be beaten in the inn, the innkeeper shall not answer for it.* S. C. 4 Leon. 96.

If a man comes to a common inn, and re-quires his horse to be put to pasture which is done accordingly, and the horse is stolen, the innkeeper is not liable.

It was resolved, *per totam curiam* this term, that if a man comes to a common inn (A), and delivers his horse to the

(A) " An inn is a house, the owner of " travellers and sojourners who are willing
" which holds out that he will receive all " to pay a price adequate to the sort of ac-

hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it; for the words of the writ which lieth against the hostler are, *Cum secundum legem et consuetud' regni nostri Angliæ (a) hospitales qui hospitia com' tenent ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transsumtes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non exentat ullo modo quidam malefactores quendam equum ipsius A. precii 40s. infra hospitium ejusdem B. &c. inventum, pro defectu ipsius B. ceperunt, &c. Vide Registr' fol. 105. inter brev' de Transgr.* and F. N. B. 94 a. b. by which original writ (which is in such case the ground of the common law) all the cases concerning hostlers may be decided. For, 1. It ought to be a (b) common inn; for if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it; for the words are *hospitales qui com' hospitia tenent, &c.* And so are the books in (c) 22 H. 6. 21 b. (d) 38. (e) 2 H. 4. 7 b. (f) 11 H. 4. 45 a. b. (g) 42 Ass. pl. 17. (h) 42 E. 3. 11 a. 10 El. (i) Dyer 266. 5 Mar. Dyer 158. (k) And the writ need not mention that the defendant keeps *commune hospitium*, for *the words of the writ in the Register are

ter 1. Br. Action sur le case, 69. (c) Fitz. Hosteler 4. Br. Action sur le case 28. Br. Action sur le Statute 39. (f) Br. Action sur le Case 41. Br. General Brief, 16. Fitz. Hosteler 5. (g) Br. Action sur le case, 86. Palm. 523. 1 Roll. 3. (A) Fitz. Hosteler 6. Br. Action sur le Case, 15. Statham Action sur le Case, 6. (i) Dyer 266. pl. 9. Post. 33 a. 3 Keb. 73. (A) Dyer 158. pl. 52. 1 And. 29, 30. 3 Keb. 73. 1 Roll. 3, 4.

(a) Plowd. 9 b. the Register is false printed, scilicet, *Dis-tractione pro subtractione*. F. N. B. 94 a. and b. Book of Entries, tit. Hosteler, f. 366, 377. 1 And. 29. 3 Keb. 73. Dyer 266 b.

(b) 1 Roll. 2 d. 1. Dr. and Stud. 137 b. Hob. 245.

(c) Fitz. Hosteler, 2 Br. Action sur le case, 58.

(d) 22 H. 6. 38 b. Fitz. Hosteler [* 32 b.]

“commodation provided, and who come in
“a situation in which they are fit to be
“received. A lodging house keeper on the
“other hand makes a contract with every
“man that comes, whereas an innkeeper is
“bound without making any special con-
“tract to provide lodging and entertain-
“ment for all at a reasonable price.” Per
Best, *J. Thompson v. Lacy*, 3 Barn. and
Ald. 287. and vid. *Parker v. Flint*, 12 Mod.
255. S. C. Cart. 417. 5 Mod. 427. 1 Lord
Raym. 479. nom. *Parkhurst v. Foster*, Bac.
Ab. Inns, B. A sign is not essential to
an inn, but it is an evidence of it, *Parker*
v. Flint, 12 Mod. 255. If a man put a
sign at his door and harbour guests, that
shall be deemed a common inn, and the own-
er chargeable, as an innkeeper; and if after
taking down the sign he continues to enter-
tain travellers, it shall be deemed a common
inn as if he had a sign, 2 Roll. Rep. 344.
One who lived at Epsom, and lodged stran-
gers in the season for drinking the waters,
and dressed victuals for them, and sold
beer to his lodgers, and to none else, and
found hay for their horses, is not an inn-

keeper, nor can his house be considered as
an inn; and per Holt, C.J. If one come to an
inn, and make a contract for lodging for a
set time and do not eat or drink there, he is
no guest, but a lodger, and as such not under
the innkeeper's protection; but if he
eat and drink, it is otherwise; or if he pay
for his diet there though he do not take it
there. *Parker v. Flint*, ub. sup. A house
of public entertainment in London where
beds, provisions, &c. are furnished for
all persons paying for the same, but which
was merely called a tavern and coffee house,
and was not frequented by stage coaches
and waggons from the country, and which
had no stables belonging to it, is to be
considered as an inn, and that where the
guest did not appear to have been a traveller,
but one who had previously resided in fur-
nished lodgings in London, *Thompson v.*
Lacy, 3 B. and A. 283. In *Doc v. Laming*,
4 Camp. 77. Lord Ellenborough held that
a coffee house is not an inn within the mean-
ing of a policy of insurance against fire,
enumerating the trade of an innkeeper with
others as doubly hazardous.

infra hospitium ejusdem B. But it is to be so intended in the writ; for the recital of the writ is, *hospitatores qui communia hospitia tenent*, &c. and the one part ought to agree with the other, and the latter words depend on the other, and the plaintiff ought to declare that he keeps *commune hospitium*: and so the said (a) books in 22 H. 6. 21. (b) 11 H. 4. 45 a. b. 10 Eliz. Dyer (c) 266, &c. are well reconciled.

(a) Ante 32 a. Fitz. Hostel. 2. Br. Action sur le Case, 58. teler, 5.

If a neighbour, who is no traveller, as a friend at the request of the innkeeper lodges there and his goods be stolen, &c. he shall not have an action.

(c) Ante 32 a. Dyer 266 pl. 9.

An innkeeper is bound to answer for himself and for his family, as to the chambers and stables, for they are *infra hospitium*.

(e) 1 Roll. 4.

Supra in a.

(f) Ante 32 a.

(g) Ante 32 a.

(h) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 255.

(b) Ante 32 a. 1 Roll. 4. Br. Action sur le Case, 41. Br. Gen. Brief, 16. Fitz. Hos-

2. The words are, *ad hospitandos homines per partes ubi hujusmodi hospitia existunt transcentes, et in eisdem hospitantes*; by which it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is, *diversorium*, because he who lodges there is, *quasi divertens se a via*; and so *diversorium*. And therefore if a (b) neighbour who is no traveller, as a friend, at the request of the innholder lodges there and his goods be stolen, &c. he shall not have an action; for the writ is, *ad hospitandos homines, &c. transcentes in eisdem hospitantes, &c.* (b).

Post. 33 a. 3 Keb. 73. (d) 1 Roll. 3 E. 4. 2 Brown. 254.

3. The words are *eorum bona et catalla infra hospitia illa existentia, &c.* So that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are *infra hospitium*. And because the horse, which at the request of the owner is put to pasture, is not *infra hospitium*, for this reason the innholder is not bound by law to answer for him, if he be stolen out of the pasture; for the thing with which the hostler shall be charged ought to be *infra hospitium*; and therewith agrees the books in (e) 11 Hen. 4. 45 a. b. (f) 22 Hen. 6. 21 b. (g) 42 E. 3. 11 a. b. 42 Ass. pl. 17. where Knivet, C. J. saith that the innholder is bound to answer for himself and for his family, of the chambers and stables, for they are *infra hospitium*: and with this resolution in this point agreed the opinion of the Justices of Assise, (viz. the two Chief Justices, Wray and Anderson) in the county of Suffolk in Lent vacation, 26 Eliz. that if an (h) innholder lodges a

(n) If a man hires a chamber for a term, *Watbroke v. Griffiths*, Moore 876, or if a person be a guest but deliver the goods on another account, Rol. Ab. Action sur Case, E., the innkeeper is not chargeable. But if a man leaves his goods at an inn, and goes about his affairs, and returns the same day, the innkeeper is answerable for them: otherwise if he does not return for two or three days. But if he leaves a horse, inasmuch as a profit may be derived on account of its keep, the innkeeper shall be answerable, notwithstanding the temporary absence of the owner, Moore 876. *Gelley v. Clark*, Cro. Jac. 189. *Drope v. Thaire*, 1 Latch. 127. and the person leaving the horse will be entitled

to be considered as a guest, *York v. Grindstone*, 1 Salk. 388. S. C. 2 Lord Raym. 866. Buller's N. P. 72. If a servant come into an inn, and ask to leave his master's goods till the next market day, and the innkeeper refuses because his house is full of parcels, and the servant sits down and drinks as a guest, and puts the goods behind him, and they are lost, the innkeeper is liable to the master, *Bennet v. Mellor*, 5 T. R. 273. But if an innkeeper refuse to receive a guest because his house is really full, and yet the party says he will shift for himself, if he be robbed, the innkeeper is discharged, *White's case*, Dyer 158 b. Doct. and Stud. 238, 239. F. N. B. 94, 95.

man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him. But (a) it was held by them, that if the owner doth not require it, but the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen, &c. And it is to be observed that this word *hostler* is derived *ab hostile*; and *hospitator*, which is used in writs for an innholder, is derived *ab hospitio*, and *hospes est quasi hospitium petens*.

(a) 1 Roll. 3, 4. 4 Leon. 96.

*4. The words are, *ita quod pro defectu hospitator', seu servientium suorum, &c. hospitibus hujusmodi damn' non eveniat, &c.* by which it appears that the innholder shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within his common inn; for the innkeeper is bound in law to keep them safe without any stealing or purloining; and it is no excuse for the innkeeper to say, that he delivered the (b) guest the key of the chamber in which he is lodged, and that he left the chamber door open (c): but he ought to keep the goods and chattels of his guest there in safety; and therewith agrees 22 H. 6. 21 b. 11 H. 4. 45 a. b. 42 Edw. 3. 11 a. And although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away, or stolen, the innkeeper shall be charged, and therewith agrees 42 Edw. 3. 11 a. And although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged, 22 H. 6. 38. 8 R. 2. Hosteler 7. *Vide* 22 H. 6. 21. But if the guest's servant, or he who (c) comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such companion or servant; and the words of the writ are, *pro defectu hospitator' seu servientium suorum*. *Vide* 22 H. 6. 21 b. But if the innkeeper appoints one to lodge with him, he shall answer for him, as it there appears. The innkeeper (d) requires his guest that he will put

But if the owner does not require it, but the innkeeper of his own head puts his guest's horse to grass, he shall answer for him if he be stolen.
2 Brownl. 255.

[*33 a.]
It is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open. Although the guest does not deliver his goods to the innkeeper to keep, nor acquaints him with them; yet if they be carried away, or stolen, the innkeeper shall be charged. If the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away

his goods, the innkeeper shall not be charged. The innkeeper requires his guest to put his goods in such a chamber, under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged. (b) Moor 78. pl. 207. 158. pl. 299. 2 Brownl. 255. (c) Cro. El. 285. (d) Moor 158.

(c) An innkeeper was held not answerable for the goods of his guest which were lost through the negligence of the guest out of a private room in the inn, chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the same time told the guest that there was a key, and that he might lock the door, which he neglected to do. And per Dampier, J., an innkeeper is not discharged by the offer of a room for lodging the guest with a key to it, unless the guest assents to such offer, and is content to take the custody

of his own goods, and discharge the innkeeper. *Burgess v. Clements*, 4 M. and S. 306. It is no plea for an innkeeper, that at the time his guest's goods were lost he was sick and insane; *Cross v. Andrews*, Cro. Eliz. 622. The loss of the goods is *prima facie* evidence of negligence on the part of the innkeeper; yet if circumstances of suspicion arise, the guest must exercise ordinary care, Per Lord Ellenborough, C. J. *Burgess v. Clements*, 4 M. and S. 306. vid. Bac. Ab. Inns, C. Com. Dig. Action against a common carrier, C. 1. *Farnworth v. Packwood*, 1 Stark. N. P. 249. Jones on Bailments 94.

† Vide Salk. 18.
(a) Antea 32 a.
b.

The inn-keeper's liability extends to all moveable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c.
(b) 2 Roll. 58.
22 E. 4. 12 a. b.
(c) Dy. 5. pl. 2.
2 Roll. 58.
Yelv. 68.

[* 33 b.]

If the guest be beaten in the inn, the innkeeper shall not answer for it.

(d) 3 Inst. 109.
10 E. 4. 14 a.
Fitz. Endict. 19.
Br. Coron. 155.

his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not † be charged, for the fault is in the guest, as it is held 10 Eliz. (a) Dyer 266.

5. The words are, *hospitibus damnum non eveniat*: these words are general, and yet forasmuch as they depend on the precedent words they will produce two effects, viz. 1. They illustrate the first words. 2. They are restrained by them: for the first words are, *eorum bona et catal' infra hospitium illa existentia absque subtractione custodire*, &c. which words (*bona et catalla*) by the said words, *ita quod*, &c. *hospitibus damnum non eveniat*, although they do not of their proper nature extend to (b) charters and evidences concerning freehold or inheritance, or (c) obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them great damages happen to the guest: and therefore; if one brings a bag or chest, &c. of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bona et catalla* generally; and the declaration shall be special.—2. These words, *bona et catalla*, restrain the latter * words to extend only to moveables: and, therefore, by the latter words, if the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his moveables which he brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person; and yet in such case of battery, *hospiti damnum evenit*, but that is restrained by the former words, as hath been said. And these words aforesaid, *absque subtractione seu amissione*, extend to all moveable goods, although of them felony cannot be committed; for the words are not *absque felonica captione*, &c. but *absque subtractione*, which may extend to any moveables, although of them (d) felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c.

[If a horse is at livery, and eats more than he is worth, an action lies against the owner: but the horse cannot be used or sold, Moor 876, 877.—but by the custom of London and Exeter the horse may be sold; but see Popham 127. *Robinson v. Walder*.]—Note to former edition, vide *Jones v. Pearce*, 1 Strange 557. *Warbrooke v. Griffin*, 2 Brownl. 255.

PAINE'S CASE.

[34 a.]

Trin. 29 Eliz. Rot. 721.

In the Common Pleas.

Lands were given to the elder daughter in tail general, remainder to the younger daughter in tail general, the elder daughter married, and had issue, which was heard to cry, and died, afterwards the elder daughter died without issue: held the husband shall be tenant by the curtesy of these lands.

PAINE
v.
SAMMES.
Pt. VIII.—34 a.

In every case where a man takes a wife seised of such estate in a tenement so that the issue which he hath by his wife might by possibility inherit the same tenement of such estate as the wife hath, as heir to the wife: after the death of the wife he shall have the same lands by the curtesy of England; otherwise not.

The time of the birth of the issue is not material if it be in the life of the wife. S. C. [1 Anders. 184. 1 Leon. 167. Goldsb. 81.]

BETWEEN Paine, plaintiff in trespass, and Sammes and Tanner, defendants, for trespass done in lands in B. in the county of Essex; on not guilty pleaded, the jurors gave a special verdict to this effect: a man hath issue two daughters, the said lands in which, &c. were given to the elder daughter, and to the heirs of her body begotten, the remainder to the younger daughter, and to the heirs of her body, &c. The elder daughter took to husband the said Sammes one of the defendants, who had issue, which was heard cry, and died, and afterwards the elder daughter died without issue; after whose death the said Sammes held himself in, claiming to be tenant by the curtesy, upon whom the younger daughter entered, and the said Sammes and Tanner as servant to him re-entered; upon which re-entry the younger sister brought the said action of trespass: and it was objected for the plaintiff, that the husband in this case should not be tenant by the curtesy, because the estate of the wife was determined, and the estate of the husband, which was derived out of the estate of the wife, could not continue longer than the primitive estate endured (A); for

(A) In the report of this case, 1 Leon. 168. Anderson, J. is made to say that "if a feoffment be made to the use of J. S., and his heirs, until J. D. hath done such a thing, and then unto the use of J. D. and his heirs, the thing is done, and J. S. dieth, his wife shall be endowed." In the report of the same case by the Judge himself, no such point is mentioned. In Golds. 81. the observation of Anderson is stated to be that "if an estate be determined by limitation,

"this will not avoid a tenancy by the curtesy: but otherwise it is if the estate be determined by a condition, for this shall relate to the defeazance of the estate." This last manner of stating the point leaves the case of a conditional limitation untouched; and merely takes the broad ground of distinction between estates spent and estates defeated; for the word *limitation* used by Gouldsbrough means a simple limitation. Whether a title of dower or curtesy is de-

(a) Co. Lit. 45b.
184 a. 351 a.
19 a. 19 b.
Plow. 560.
2 Roll. Rep. 491.
Dyer 49. pl. 6.
Bro. Accept. 19.
B. N. C. 370.

[* 34 b.]

(b) Co. Lit. 30
a. 31 a. 358 b.
F. N. B. 149 d.
Perk. sect. 304.
Dr. & Stud. 84a.
(c) Co. Lit. 29
a. 40 a. Perk.
sect. 457.
(d) Co. Lit. 30a.

(e) Co. Lit. 30 a.
Perk. sect. 466.

In every case
where a man
takes a wife,
seised of such
estate in a tenement so that

the issue which he hath by his wife might by possibility inherit the same tenement of such estate as the wife hath, as heir to the wife; after the death of the wife, he shall have the same lands by the curtesy of England; otherwise not. (f) Co. Lit. 40 a. Lit. sect. 52.

feated by the operation of a conditional limitation is a point which has been much doubted in practice. In *Buckworth v. Thirkell*, 1 Coll. Jur. 332. 3 Bos. and Pul. 652 n. Butl. Co. Litt. 241 a. note, it was decided that a man is entitled to curtesy of a fee determined by executory devise or shifting use. And although the authority of this case has been frequently questioned; Park on Dower 179. Sugden on Powers 338. 3rd edit. Butler Co. Litt. 241 a. n. Preston Abstracts, Vol. III. 372.; yet it was followed in the case of *Goodenough v. Goodenough*, K. B. 1775. And in the late case of *Moody v. King*, 2 Bing. 447. which was sent by the Vice-Chancellor for the opinion of C. B., the Court fully recognized and adopted its authority. It may now, therefore, be consi-

cessante statu primitivo cessat derivativus; and, therefore, if (a) tenant in tail makes a lease for lives, according to the statute of 32 H. 8. cap. 28. and afterwards dies without issue, this lease being derived out of the estate tail, shall not continue longer than the estate tail, against the opinion in 33 H. 8. 48 a. Dyer, *quod fuit concessum per totam curiam*. And when the wife dies without issue, he in remainder shall enter by force of an immediate gift to him, and his issue shall have a *Formedon* in the descender upon an immediate gift; *and it is not like the case of dower; for the wife shall be endowed although she hath no issue; and, therefore, although the estate determines or not, for want of issue, yet the wife by the law shall be endowed: but a man shall not be tenant by the curtesy unless he hath issue, nor if he hath issue, unless the same issue, or some other, support the estate which he shall hold by the curtesy; and dower is more favoured than the estate of a tenant by the curtesy; for a woman shall be endowed of lands where the husband had but a seisin in (b) law: but a man shall not be tenant by the curtesy of land unless the wife was (c) actually seised in deed. To which it was answered and resolved by the whole Court, that at the common law, if (d) lands had been given to a woman, and the heirs of her body, and she had taken a husband and had issue, and the issue died, and the wife also without issue, whereby the inheritance of the land did revert to the donor, in that case the estate of the wife is determined, and yet the husband shall be tenant by the curtesy, for that is *tacite* implied in the gift. It is adjudged in 21 H. 3. (e) Dower 198. that if a man hath issue by a woman inheritrix, which is dead, which issue might inherit the land, he shall be tenant by the curtesy, although the wife, by a former husband, have issue inheritable, and although that issue be dead. And therewith Litt. agrees, lib. 1. cap. Dower, fol. 10 b. (f) in every case, where a man takes a wife seised of such estate in a tenement, so that the issue which he hath by his wife might by possibility

inherited as settled that a woman is dowable of a fee determined by executory devise or shifting use.

It has also been doubted whether a woman will be entitled to be endowed of a fee in her husband, which is defeated by a power of appointment in him: but this point is now settled. In *Ray v. Pung*, 5 B. and Ald. 561. certain lands were conveyed to such uses as C. D. should by deed appoint; and in default of, and until appointment to the use of C. D. in fee, C. D. afterwards in execution of the power by deed duly made an appointment of the said estates in favour of E. F. in fee; C. D. at the time of making the appointment was married. His wife was held not to be dowable out of these lands.

inherit the same tenement of such estate as the wife hath, as heir to the wife, in such case, after the death of the wife, he shall have the same lands by the curtesy of England; otherwise not. By which maxim it appears, that the seisin of the wife ought to be of such inheritance which ought to have this incident amongst others, that the issue which the husband shall have by her may, by possibility, inherit; and that may fail, either in respect of the issue, or in respect of the manner of inheritance. In respect of the issue, if it be born dead. And therefore Glanvil, l. 7. c. 18. *Si ex uxore sua hæred' habuerit filium vel filiam clamantem et auditum infra quatuor parietes, &c. Et Bract. l. 5. De Except', c. 30. s. 437, 438. Si quis uxor' duxerit habentem hæredit' vel maritagium, vel aliquam terram causa donationis, si liberos int' se habuerit ex justis nuptiis procreat', si uxor' præmoriatur, remanebit viro hæredit' et terra sua tota vita ipsius viri, sive superst' fuerit liberi sive mortui, dum tamen semel aut vocem aut clamorem dimiserint, quod audiatur int' quatuor parietes, si hoc probet': et licet partus moriatur in ipso partu, vel vivus nascatur, vel forte semimortuus, licet vocem non emisit, solent obstetrices in fraud' veri hæred' protestari partum vivum nasci et legitim' et ideo necesse est vocem probare; et licet naturaliter mutus nascatur et surdus, tamen clamorem emittere debet, sive masculus sit sive fæmina (unde versus) nam dicunt E. vel A. quotquot nascuntur ab Eva. And Fleta, lib. 6. cap. 56. and he agrees with Bracton, fere eisdem verbis. So that Litt. lib. 1. cap. 4. fol. 7 b. might well say, (+) some have said, that he shall not be tenant by the curtesy unless the child which he *hath by his wife be heard (a) to cry; for by the cry it is proved that the child was alive; ideo quære. But he saith before in the same chapter, if the husband have issue crying, or alive, so that in his opinion the crying is not necessary; for it is true, if the issue be born alive, it sufficeth, and the crying of the child is but a proof that it is alive: and this is well proved by the form of pleading (which is the strongest proof in law), for the pleading in such case is, *Quod præd' A. G. fuit seisit' de tenement' præd' in dominico suo ut de feodo, et sic inde seisit' cepit in vir' J. W. per quod idem J. et A. fuer' seisit' de tenement' præd' cum pert' in dominico suo ut de feodo in jure ipsius A. ipsique sic inde seisiti existent' habuer' exitum inter eos, &c. posteaque præd' A. uxor' præd' J. obiit, idemque J. ipsam supervix', et se ten' in tenem' præd' ac inde fuit seisit' in dominico suo, ut de lib' tenem', ut tenens inde per leg' Angl'. And if in that case issue be taken, quod non habuer' exitum, &c. the effect of the issue shall be, whether they had issue born alive, quia mortuus exitus non est exitus; and the crying is but a proof of the life. Vide 28 H. 8. (c) Dyer 25. But in the case at bar, to remove all scruples, it was found that the issue was heard to cry. And in this case it was well observed, that Glanvil, Bracton, Britton, and Fleta, may be vouched for antiquity and ornament in cases where they concur with the later authority of law, and do not impugn the common experience and allowance in judicial proceedings at this day. 2. If a wife shape of mankind, is no issue in law: but a mere defect or deformity in hand or foot is immaterial.**

+ Lit. sect. 35.
Co. Lit. 29 a.
30 a.

[* 35 a.]

To entitle to curtesy, it is sufficient the issue be born alive. The crying is but evidence of the fact.

(a) 1 And. 35.
Perk. sect. 471.
Co. Lit. 29 b.
30 a.

Dyer 25. pl. 159.
O. Ben. 25. pl. 103.

(b) Co. Lit. 29 b.

(c) Dy. 25. pl. 159.
O. Ben. 25. pl. 103. 1 And. 35.

(d) 10 Co. 73 a.
Plowd. 357 a.

A monster, not having the

- (a) Co. Lit. 29 b. be delivered of a (a) monster, which hath not the shape of mankind, it is no issue in the law; but although the issue have some (b) deformity or defect in the hand or foot, and yet hath human shape, it sufficeth; and therewith agrees Bracton *ubi supra*. *Item, si cum partum ediderit, tamen prius declin' ad monst', et cum clam' emitt' deber', emitt' rugit', et hinc videt' quod ten' non debet exceptio (i. e. ten' non debet per leg' Angl') quia partus monstr' est cum non nascat' ut homo; sed non dico part' monstr' licet natura memb' minuer' vel ampliaverit, minuer', ut in defect' digitor' vel hujusmodi, ampliaverit, ut si plur' digitos vel articul' sicut sex vel plures, ubi non debet hab' nisi quinque si inutilia natura redd' memb', ut si curvus fuer', vel gibbosus, vel memb' tortuosa habuer'.* 3. In some cases the time of the birth is material, and in some not; and therefore when the Lord Dyer was Serjeant, he was (as he himself said in the Common Pleas) of counsel with this case: one Reppes of Norfolk, took to wife an inheritrix, who was great with child by him, and died in her travail, and the issue was (c) ripped out of her belly alive, and by reference out of the Chancery to the Justices, they resolved, that he should not be tenant by the curtesy, for it ought to begin by the birth of the issue, and be consummated by the death of the wife *and the estate of tenant by the curtesy ought to take away the immediate descent. But if a man (d) hath issue by his wife, and afterwards land descends to the wife, be the issue alive or dead at the time of the descent, he shall be tenant by the curtesy, for the time of the birth of the issue is not material, if it be in the life of the wife. 4. In respect of the manner of inheritance; as if (e) lands be given to a woman, and the heirs male of her body, and she takes a husband, and hath issue a daughter, the husband shall not be tenant by the curtesy; for the issue cannot by any possibility inherit the same lands; and so out of the rule of Littleton and of the judgment in 21 H. 3. And at the common law, (f) if lands had been given to husband and wife, and to the heirs of their two bodies begotten, and they had issue, and the husband died, and she took another husband, and had issue, the second husband should be tenant by the curtesy; and so is it adjudged in † 30 E. 1. Form. 66, which proves that the issue by the second husband might possibly inherit; for at the common law after issue, it was taken to (g) three purposes, that the tenant in tail had a full fee-simple. 1. To alien. 2. To forfeit it by attainder of felony, as the book is in 7 E. 3. 6, and 7 b.. so that, although the tenant in tail afterwards died without issue, the land should not revert to the donor. 3. That the tenant in special tail, by having issue, had a full fee-simple to make the lands descendible to her issues by any other husband: for as by her (h) alienation she might make strangers to the blood to be absolutely inheritable; so by construction of law, after issue had, all lineal heirs of her body, by what husband soever they were begotten, should inherit to her, as a benefit and incident *tacite* annexed to her estate by the law; for it was said, that by the having of issue, it was a gift and disposition in law to the hus-
- If the child be ripped out of the belly of the wife deceased, the husband is not entitled to curtesy: but if the issue be dead at the time of the descent, it is im-
[* 35 b.]
material.
- (c) Co. Lit. 29 b.
(d) Co. Lit. 25 b.
- To entitle to curtesy, the issue must be such as might have inherited.
- (e) Co. Lit. 29 b.
- (f) Perk. sect. 465.
- † Postea 36 a.
- At common law, after issue, tenant in tail to three purposes had a fee-simple.
(g) Co. Lit. 19 a.
1 Roll. 840.
2 Inst. 334.
(h) Co. Lit. 19 a.
- 7 Co. 35.

band for his life; which disposition and alteration of the estate, although it be for life, *tacitè* as an incident to it, makes the issue of the second husband inheritable. As if a (a) man hath issue a son and a daughter by one venter, and a son by another venter, and dies, if the elder son makes a lease for life, against whom the wife of the father recovers dower, and afterwards the elder son dies, the sister shall have the reversion in fee, because the elder son hath altered the reversion by his lease for life, and the tenant in dower leaves the reversion in the lessee for life, *vide* 7 H. 5. 4.: but that the issue of the second husband shall inherit in such case, is directly proved by the statute *De Donis conditionalibus* (b), *nec habeat de cætero secundus vir hujusmodi mulieris aliquid tenemento sic dato per conditionem post mortem uxoris suæ per legem Angliæ, nec exitus de secundo viro et muliere successionem hæred*: for if the issue of the second husband should not inherit, the second husband shall not be tenant by the curtesy; as it was adjudged in the said case in 21 H. 3. And Fleta, *ubi supra*, saith, *lex tamen ista ad secundos viros non extenditur, eo quod palam inhibetur per statutum*: but after issue had, the tenant in tail at the common law had not such a fee-simple, that his (c) collateral heir which is not heir of his body, should inherit. And if land were given before the statute to husband and wife, and the heirs of their two bodies, and they have issue, and the wife dies, and the husband take another wife, she shall be endowed, as it is held in 12 H. 4. 2. Markham's case; and by consequence the issue, which she by possibility might have, shall inherit the land. And *vide* Fitz. tit. Tail 2., and mark the agreement of the law in both the said cases. And where Littleton saith, (d) as heir to the wife, these words are very material; for that is the true reason, that a man shall not be tenant by the curtesy of a seisin in law, for in such case the issue ought to make himself heir to him who was last actually seised, &c. *vide* 11 H. 4. 11. 40 E. 3. 9, &c. And the tenant by the curtesy shall be attendant to the lord paramount, which he cannot be, because the wife died before she was actually seised: but tenant in dower shall not be (e) attendant to lord paramount, but to the heir, and therefore she shall be endowed of a seisin in law. And the case at bar is directly within the said maxim, for the issue of the husband which he had by his wife might by possibility have inherited the wife. 2. It appears, that at the common law the husband shall be tenant by the curtesy, if he hath issue, although afterwards the wife dies without issue, as it is adjudged in (f) 30 E. 1. *ubi supra*, and this case is not restrained by the statute aforesaid. 3dly. Lit. lib. 1, cap. 4. fol. 7., agrees with this judgment, for he saith, that (g) tenant by the curtesy of England is, where a man takes a wife, seised in fee-simple, or in fee-tail general, or as heir of the special tail, and hath issue by the same woman, male or female, heard or alive, be the issue afterwards dead (note that) or alive, if the wife dies, the husband shall hold the land during his life, by the curtesy of England. So that it appears by him that it is not material whether the estate tail continues or not.

(a) Co.Lit.15 a.

(b) 2 Inst. 336.

[* 36 a.]

(c) Co.Lit. 19 a.

The reason a man shall not be tenant by the curtesy of a seisin in law. (d) Co.Lit. 40 a. and note (2).

(e) 9 Co.135 b. 1 Roll. 685.

(f) Antea 35 b.

(g) Co.Lit.29 a. Lit. sect. 35.

The true reason of dower, and the reason of this case, viz. the possibility of the issue to inherit, are all one; and the right to curtesy of an estate tail is not defeated, although the estate tail be determined.

4. It appears that the true reason of dower, and the reason of this case, (*scilicet*) the possibility of the issue to inherit, &c. are all one. And if (a) tenant in tail takes a husband, and hath issue and dies, now the husband is tenant by the curtesy; and although afterwards the issue dies without issue, so that the estate tail is determined, yet his estate shall continue; for it is not derived merely out of the estate of the wife, but is created by the law, by privilege and benefit of law *tacite* annexed to the gift.

(a) Co. Lit. 30 a.

[36 b.]

THE CASE OF BARRETRY.

Paschæ 30 Eliz.

Pt. VIII.—36 b. A common barretor is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in courts, or in the country in courts of record, and in the county, hundred, and other inferior courts. And in the country in three manners.

1. In disturbance of the peace.
 2. In taking or detaining of the possession of houses, lands, or goods, &c., which are in question or controversy, not only by force, but also by subtilty and deceit.
 3. By false invention and sowing of calumny, rumours, and reports, whereby discord and disquiet arises between neighbours.
- *What makes a common barretor, and why so called.*

(b) Co. Lit. 368 a. 3 Inst. 175.

(c) Co. Lit. 368 a. b.

NOTA, on evidence upon a traverse of an indictment of barrettry, it was held *per curiam*, that a common (b) barretor is a common mover or stirrer up, or maintainer of suits, quarrels, or parties, either in courts or in the country: in courts of record, and in the county, hundred, and other inferior courts: in the country in (c) three manners. 1. In disturbance of the peace. 2. In taking or detaining of the possession of houses, lands or goods, &c., which are in question or controversy, not only by force, but also by subtilty and deceit, and for the most part in suppression of truth and right. 3. By false invention, and sowing of calumny, rumours, and reports, whereby discord and disquiet arise between neighbours. And all the said qualities of a common barretor are proved by the indictment of one for barrettry, and by our books: for first it is said in the indictment, *quod est communis barrectator*, within which word is included a quarreller in his own cause, and a mover or

maintainer of quarrels between others, for the most part in suppression of truth and right : and this appears by the statute of Westmin. 1. (a) cap. 33. It is provided, that no sheriff suffer any barretors or maintainers of quarrels in their county courts, &c. In 40 Ed. 3. 33 b. the (b) plaintiff counted in a *decies tantum*, that the recognitors in an assise took of certain people who were barretors and embracers of the said suit, *scil.* of every one 20s. which was in a cause depending in a court of record. The statute of (c) Ragman the King wills and enjoins the justices, that none in complaining nor in answering *be not surprised nor encompassed by (d) hockettors or barretors ; that the truth be not followed, and the trespasses remain unpunished. And the statute of West. 1. c. (e) 18. Forasmuch as the common fine and amerciamment of the whole county in Eyre of the justices for false judgments, and other trespasses, is unjustly assessed by sheriffs and barretors of the counties, so that the sum is many times increased, and the parcels otherwise assessed than they ought to be, to the damage of the people. And that will be sufficient to excite or maintain quarrels in courts : and for moving or maintaining quarrels in the country, Littleton, lib. 3. cap. Warranty, fol. 158. If (f) A. de B. be seised of a house, and F. de G. who hath no right, enters in the same house, claiming the house to him and his heirs, but the said A. continually dwells in the said house ; in that case the possession of the freehold shall be continually adjudged in A., &c. But if the said F. G. makes a feoffment to certain barretors in the country, to have maintenance of them in the same house, by a deed of feoffment with warranty, by force whereof A. de B. dares not stay in the said house, but goes out of it, &c. this warranty commences by disseisin. By all which, and by many other authorities which might be cited, it appears, that a common barretor is a common mover or maintainer of quarrels, either in courts or in the country. If it be asked why this busy-body is called barretor ? Some derive a (g) barretor from the French word (*barrateur*) which signifies a deceiver : others from the Latin word (*baratro*) which signifies a vile knave, or unthrift : others because they maintain pleas at bars in courts, or stir causes of suits, derive this word (*barretor*) from two legal words ; (*barra*) which signifies the bar in courts, where causes are debated, &c. and (*rettum*) which, as appears in the writ *De homine replegiando*, in the Register, signifies a crime or offence ; and because a common barretor is principally an offender in moving or maintaining of quarrels at bars, *scil.* in courts, or in the country, which are causes of suits in courts, he is called a barretor, or bar offender. In the civil law, *barrataria dicitur quando judex petit aliquid indebitum ut justitiam faciat*. But in the law of England, this word (*barret*) doth signify a quarrel, whence he who moves or maintains quarrels is called a barretor ; and it is so expounded by the whole Parliament, in 33 E. 1. in *Stat' De Conspir'* where the act saith, stewards and bailiffs of great lords, who by their seigniori, office, or power, take upon them to maintain or sustain pleas or barrets, for other parties than

(a) 2 Inst. 225.

(b) Fitz. Decies tantum 8. Br. Decies tantum 3.

(c) 3 Inst. 175.

[* 37 a.]

(d) 3 Inst. 175b.

(e) Postea 39 b. 2 Inst. 196, 197.

(f) Lit. 158 b.

159 a.

Sect. 701.

(g) Co. Lit. 368 a. b. 1 Salk. 423

What makes a common barretor, and why so called.

(g) Co. Lit. 368 b.

[* 37 b.]

The party must be a common barretor, not in one or two, but in many causes.

(a) 9 Co. 66 a.
Postea 127 a.

(b) 5 Co. 73 a.
6 Co. 7 a.
9 Co. 79 b.
Postea 98 b.
Co. Lit. 103 a.
2 Inst. 411.

*those which touch their lords or themselves. Where it is manifest, that barrets signifies quarrels: but he ought to be *communis barrectator*, *scil.* not in one or two, but in many causes, so that he may be proved a common barretor. 2. The words of the indictment are, *pacis domini Regis perturbator*, *scil.* a common mover or maintainer of brawls and frays, by which the peace is broken. The other words of the indictment are, *communis malefactor*, *calumniator*, *et seminator*, *litium et discordiarum inter vicinos suos*: malefactor, because he willingly and maliciously doth wrong to his neighbours, either openly after warning, or secretly, as in the night, &c. *quia* (a) *qui male agit odit lucem*: calumniator, so called, because by false and malicious scandals, he endeavours to rob his neighbour of his good name, which is a great motive of discords and quarrels, and is against the law of God, Levit. 19. *non facias calumniam proximo tuo*: *seminator litium et discordiarum inter vicinos*; and from such seeds presently grow up many ill herbs, *inimicus homo superseminavit zizania*. And that is against the commonwealth; for (b) *expedit reipublicæ, ut sit finis litium*. And this barretor is *seminator litium*, &c. and that is likewise against the law of God, Levit. 19. *non eris susurro in populo*. In ancient indictments, after these words, *pacis domini Regis perturbator*, these words are added, *et oppressor vicinorum suorum*, and that is either by force, as in the case of Littleton, in taking or keeping of possession, or by fraud and malice, under colour of law, as by multiplicity of unjust and feigned suits, or by information on penal laws, either in his own case, or in malicious bringing of a special *Supplicavit*, or *Latitat*, of the peace; and all this by fraud and malice, to enforce the poor party *ad redimendum vexationem*, to give him money, or to make other composition; and this is the most dangerous oppressor, for he oppresses the innocent by colour and countenance of the law, which was instituted to protect the innocent from all oppression and wrong: and, therefore, the said words in the old indictments (if the truth of the case be such) are material to be inserted in the indictment of barretry (A).

(A) It is essential to the validity of an indictment for this offence, that it should charge the defendant with being a common barretor, which is a term of art appropriated by law to this crime, and cannot be supplied by words which may import as much. *Rex v. Hardwicke*, 1 Sid. 282. The indictment need not shew the place where, nor the cause for which, he is a common barretor. *Parcel's case*, Cro. Eliz. 195. *Queen v. Hannon*, 6 Mod. 311. *Palfrey's case*, Cro. Jac. 527. 1 Hawk. P. C. c. 81. But in *Mann's case*, 3 Car. B. R. the indictment was quashed for want of a vill alleged; and Lord Hale observes that this resolution is the fittest to be observed. 2 Hale P. C. 180. It is sufficient to aver that the party was a common barretor without adding particular instances;

on the same principle which permits a general averment that a party is a common scold. 2 Hawk. c. 25. s. 59. *Rex v. Margaret Cooper*, 2 Strange 1246. Burn's Justice, Nuisance, § 3. or an averment that the defendants kept a common gaming house. Vide *Rex v. Rogier*, 1 Barn. and Cross. 275. S. C. 2 Dow. and Ryl. 431. But it is a settled practice that in an indictment for barretry, the prosecutor must give the defendant before the trial a note of the particular acts of barretry which he intends to prove against him: and if he do not, the Court will not suffer the prosecutor to proceed in the trial of the indictment, for otherwise it will be impossible for him to prepare a defence against so general and uncertain a charge. 1 Hawk. P. C. c. 81. s. 13. *Rex v. Grove*,

5Mod.18. Per Buller, J., *J'Anson v. Stuart*, 1 T. R. 754., and the prosecutor will not be permitted to give any other acts of barrettry in evidence than those which are stated in the note of particulars. *Goddard v. Smith*, 6 Mod. 262. And it seems clear that no one can be a barretor in respect of one act only, for that would not make him *communis barretor*, text *supra*; and the offence from the nature of the thing consisting in the repetition of several acts must be intended to have happened in several places, for which cause it has been held that the trial shall be out of the body of the county. 1 Hawk. P. C. c. 81. s. 11. 2 Hale P. C. 180., Vid. now stat. 6 Geo. 4. c. 50. s. 13. that every *venire facias* shall be from the body of the county. Justices of the peace, as such have by virtue of

the commission of the peace authority to inquire of and hear this offence. *Barnes v. Constantine*, Yelv. 26. S. C. Cro. Jac. 32. recognised *Busby v. Watson*, 2 Black. 1050. 1 Hawk. P. C. c. 81. s. 8.

Barrettry is an offence at common law, the stat. 34 Ed. 3. c. 1. directs the modes of punishing it. If the indictment concludes against the *form of the statute*, these words may be rejected as surplusage. *Burton's case*, Cro. Eliz. 148 a. *Chapman's case*, Cro. Car. 340.; and the indictment will be good, provided it concludes also *contra pacem domini regis*. *Palfrey's case*, Cro. Jac. 527. 2 Hale P. C. 191. Vid. note (1). *Rex v. Urtlyn*, 2 Saund. 308., and *Rex v. Taylor*, 3 Barn. and Cress. 511. S. C. 5 Dow. and Ryl. 422.

GRIESLEY'S CASE,

Trin. 30 Eliz. Rot. 1012.

In the Common Pleas.

A. being an inhabitant within the manor of K., to which a court leet was appendant by prescription, was at the leet held before the steward according to the custom chosen to be constable of K. for one year, by the jurors and presenters of the said Court; and being present in Court, was charged by the said steward to take the oath, which he utterly refused to do, and departed in contempt of the Court, upon which the said steward fined him five pounds; and because the said fine of five pounds was not paid, the cattle of the said A. were distrained; held the fine was well imposed, and the distress well taken.

If any contempt or disturbance to the Court be committed in any court of record, the Judges may set upon the offender a reasonable fine.

A leet is a court of record, and the steward is judge there.

Courts which are not of record cannot impose a fine, or commit any to prison.

The fine imposed by the steward of the leet is good without any amercance.

A fine is always imposed and assessed by the Court: but an amercement is assessed by the country.

The jurors of the leet have consuance of those offences which are done out of Court, and power to present them, and to assess an amercement for them: but the steward hath consuance of contempts and misdemeanors in Court before himself; and may impose a fine for them, and thereof need not make inquiry.

For an amercement for offences out of Court, and for fines imposed for offences done in the Court, a distress shall be incident of common right, S. C. [Sav. 93. Vid. the Entry, Co. Ent. 572. pl. 2.]

KINGSTON
v.
BAILLY.
Pt. VIII.—38 a.

Dougl. 537.
Com. Dig. Leet
M. 6.

IN a replevin brought by Thomas Kingston against Richard Baily the elder, and Richard Baily the younger, in a place called Stockings, in Kingston, in the county of Stafford; the defendants, as bailiffs to Thomas Griesley, Esq. did acknowledge the taking of the said cattle, in the said place, where, &c. For they said, that the said place, where, &c. contained six acres; and that the said Thomas Griesley was seised of the manor of Kingston, within which manor, the said place where, &c. is, in his demesne as of fee, and prescribed to have *curiam visus franc' pleg' coram seneschallo suo infra manerium illud tenend' bis per annum, viz. semel infra mensem proximum post festum Paschæ, et iterum infra mensem proximum post festum Sancti Michaelis Archangeli de omnibus inhabitantibus et residentibus infra manerium prædict' tanquam ad manerium illud pertin': quodque infra manerium præd' habetur, et a tempore cujus contrarii memoria hominum non existit, habebatur talis consuetudo, quod inhabitantes et residentes infra manerium præd' ad inquirendum et præsentandum ea quæ ad visum franc' plegii pertinent onerati et jurati, annuatim ad curiam vis' franc' plegii illius apud manerium illud, infra mensem proxim' post festum Sancti Michaelis Archangeli tent', elegerunt et eligere consueverunt unum idoneum hominem de inhabitantibus infra manerium prædict' ad essendum Constabularium de Kingston pro ann' tunc proximo sequen', qui quidem homo sic electus *officium illud pro uno anno exercere per totum tempus præd' consuevit, et si præsens fuerit hujusmodi electioni tunc per totum tempus præd' jurari consuevit per seneschallum curiæ præd' in aperta curia ad officium illud exercendum. And that at the court of view of frankpledge held at the said manor, 5th of October, 28 Eliz. before John Newport, then Steward of the said Thomas Griesley of the said Court, the said Thomas Kingston being an inhabitant within the said manor, was, according to the said custom, chosen to be constable of Kingston, præd' pro uno an' tunc proxim' sequen' by the jurors and presenters of the said Court, and he being present in Court, was charged by the said steward to take the said oath, which he utterly refused to do, and departed in contempt of the Court, ob quod præd' Johannes Newport, adtunc seneschallus ejusdem curiæ finem centum solidorum super præd' Thom' Kingston adtunc in eadem curia imposuit. And because the said fine of 5*l.* was not paid to the said Thomas Griesley, the defendants made conusans, as bailiffs of the said Thomas Griesley, of the distress of the plaintiff's cattle, in the place where, &c. upon which the plaintiff did demur in law; and in this case these questions were moved and debated. 1. Whether the steward might impose a fine in this case. 2. Whether this fine ought to be assessed or not. 3. Whether the lord of the leet might distrain for such fine, without a custom enabling him so to do. As to the first it was resolved, *per totam curiam*, that if any contempt or disturbance to the Court be committed in any court of record, that the Judges*

11 Co. 43, 45.

A leet is a court of record, and the steward is judge there,

and therefore he may set a reasonable fine for any contempt before him But Courts which are not of record cannot fine or imprison.

might set upon the offender a reasonable fine (A), and a leet is a court of record, and the steward is judge there; and, therefore, if any contempt (a) or disturbance to the Court be made before him, he may set a reasonable fine upon the offenders; as if the bailiff of a leet refuses in Court to execute his office, the steward may set a reasonable fine upon him; and therewith agrees the book in (b) 7 H. 6. 12 b. So if a tithingman refuses to make a presentment in a leet, the steward shall set a reasonable fine upon him, as it is held in (c) 10 H. 6. 7 a. So if one of the jurors in a leet departs without giving his verdict, he shall be fined by the steward, as appears in the book of Entries, title Amerciament in Debt, fol. 149. *Et sic de similib' (B)*. But courts which are not of record, cannot impose a fine, or commit any to prison. As to the second, it was objected, that the fine in the case at bar ought to be assessed; and to prove that, the statute of *Magna Charta, cap. 14. Liber homo non amercietur pro parvo delicto nisi (d) secundum modum illius delicti, et pro magno delicto secundum magnitudinem delicti, salvo, &c. et nulla præd' misericordiarum ponatur nisi per sacramentum probor' et legal' hom' de vicineto: Comites autem et Barones non amercientur nisi per pares suos, &c.* And by the statute of Westminster 1. (e) (cap. 6.) it is provided, no city, borough, or town, nor any man, shall be amerced without a reasonable cause, and according to the quantity of the trespass; a freeman, saving his contenement; a merchant, saving his merchandize; and a villain, saving his wainage; and that by their equals. And 10 (f) E. 3. 9, and 10. was cited and strongly urged, where the case was that William Freeman brought a replevin against the abbot of Ramsey and others, that they had wrongfully taken his cattle, &c. The abbot avowed the taking, by reason he is lord of

Carth. 494.
Post. 60 b. &c.
ibid.
Fitzgib. 192.
(a) Dyer 221.
pl. 31. 233. pl.
14, 322.
Owen 113.
Moor 470.
1 Roll. Rep. 33,
74. 2 Roll. Rep.
3. Cro. El. 241,
581. Cr. Car.
567.
(b) 11 Co. 43 b.
2 Roll. Rep. 3.
Br. Det. 85.
Br. Leet 14, 36.
(c) Br. Leet 36.
Br. Leygager
99. 2 Roll. Rep.
3. 11 Co. 43 b.
(d) 11 Co. 43 a.
44 a. 13 Co. 3.
[* 39 a.]
Selden's Table
Talk, Fines 61.
F. N. B. 75 a.
(e) 2 Inst. 169,
170.

(f) 11 Co. 43 a.
Postea 40 b.
1 Roll. Rep. 73.

(A) A judge sitting at Nisi Prius has power to impose a fine on a defendant pleading his own cause, for a contempt, as where the defendant persists in reviling the Christian religion, attacking the characters of persons not before the Court, &c. *Rex v. Davison*, 4 Barn. and Ald. 329. A court of general gaol delivery has power to make an order prohibiting the publication of a trial pending the proceedings, and until the whole trial is completed; and, therefore, being a court of record has the power of imposing a fine for a contempt in disobeying the order and that although the party was not present at the time of imposing the fine, provided he had notice, and his absence was voluntary. *Rex v. Clement*, 4 Barn. and Ald. 218. 11 Price 68., and vid. the cases cited there.

(B) So a fine may be imposed by the steward of a leet for a contempt to him by giving him the lie while in the discharge of his office. *Earl of Lincoln v. Fisher*, Cro. Eliz. 581. S. C. [Ow. 113. Mo. 470.] So if the steward desire a man to be uncovered,

and he says he does not regard what he can do. *Bathurst v. Cox*, T. Raymond 68. So the refusal to make a presentment is a contempt for which the steward may assess a fine on the jury. Kitch. 82. So if any of the jury give their verdict before they are all agreed, they shall be fined. 1 Roll. Ab. Amercement, Y. 4. p. 214., and vid. acc. with the principal case, that a fine may be set upon the constable, who being present should refuse to be sworn. *Fletcher v. Ingram*, Salk. 175. S. C. [5 Mod. 127. 1 Ld. Ray. 70. Skin. 635.] So if the jury be sworn to present articles of the leet, and refuse to do it, each may be fined for such concealment and contempt. Dyer 211 b.

But the steward cannot fine for words which do not import a contempt; as if a man say to the steward in the town hall, that the mayor has more right there than the steward himself. *Bevington v. Brooks*, T. Jones 229. Vid. Com. Dig. Leet. N. 3. Scriven on Copyholds, Vol. II. 849.

the hundred of F. within which hundred he hath a leet in the town of M. (where the plaintiff is resiant) to hold once a year, *scil.* every year after the feast of St. Michael, when he will warn it, &c. and at the leet warned and held there at such a day, &c. twelve were sworn to present things presentable, which belonged to their oath, and that the said William was one of them; and after they had received the articles, they were commanded to answer to the articles, and to present, &c. and they refused; for which cause the said William, and the others, were amerced, and the amercement of him was affeered to half a mark; and for the said half mark he did avow; and there exception is taken by Ashton to the avowry, because the amercement was upon them all in common, and the afferance of the amercement was several, *scil.* upon William half a mark, &c. Parning: It should be thus, according to law; for because all refused, all shall be amerced: but every one shall be affeered by himself, *secundum quantitatem delicti*; as in assize of novel disseisin all the disseisors shall be amerced, and each affeered by himself. Ashton: If a decennary of a town is amerced in Eyre, the afferement shall be in common, &c. Parning: Is it not like the case, for when a decennary or town is amerced, there is no certain persons named, as there is in this case; and the avowry was awarded to be good: by which it appears, that a fine imposed for a contempt in court ought to be affeered. To which it was answered and resolved, that in the case at bar, the fine imposed by the Steward was well enough without any afferance, and therefore a (a) difference between a fine and an amercement: for a fine is always imposed and assessed by the court, but an amercement, which is called in Latin *misericordia*, is assessed by the country. And this word (*afferer*) is as much as to say *ponere in certitudinem, seu taxare, scil.* to assess or tax, and the afferance is as much as to say assessment, or taxation. And afferors are assessors, or taxers, and are derived from the ancient French word (*afferer*) which signifies *taxare, &c.* And this appears by the statute *of Westm. 1. cap. (b) 18. whereby it is enacted that amercements before Justices in Eyre, &c. shall be assessed by the oaths of knights and of honest men; where this word assessed is as much as to say affeered. And the statutes of *Magna Charta*, and Westm. 1. (c) extend to amercements, and not to fines; for amercements ought to be affeered, or taxed, or assessed *per pares*, as if the demandant or plaintiff be nonsuit, or if judgment be given against the tenant or defendant, or upon the bail because the principal doth not appear, or upon the plaintiff, *quia non est prosecutus*, or *pro falso clamore*, or the like, &c. the Justices shall never assess any amercement, but by the said statutes they ought to be assessed *per pares*. But the Court in such cases saith, *ideo in misericordia* generally, without taxing or assessing any sum certain; and the (d) Clerk of the Warrants in the Common Pleas makes estreats of these amercements, and delivers them to the clerk of the Assize within every circuit, to deliver them to the Coroners in every county to affere, *i. e.* to assess the amerce-

Fitzgib. 46.

The fine imposed by the steward is good without any afferance.

A fine is always imposed and assessed by the Court: but an amercement is assessed by the country.

(a) 11 Co. 43 b. Co. Lit. 126 b. [* 39 b.]

Br. Amercement 25, 65. Kelw. 65 a.

Palm. 7. Cro. Car. 275. Cart.

28. 2 Inst. 196. 10 H. 6. 7 b.

Cro. El. 241. 1 Roll. Rep. 74.

(b) Ante 37 a. 2 Inst. 196, 197.

2 Wilson 20. (c) 2 Inst. 27.

Fitzgib. 46.

(d) F.N.B. 76 a. See Hist. View of the Excheq. cap. 8.

ments, which they do accordingly; and such assessment by the Coroners in every county hath been held a satisfaction of the said statute of *Magna Charta*, by which it is enacted, *quod null' præd' misericordiarum ponatur nisi per sacram' probor' et legal' hom' de vicineto*: and the coroners of the county were thought most indifferent, because they are chosen by the whole county: but if a man be nonsuit after the jury be ready to give their verdict, the Court may cause the amercement to be presently affeered in the Court by the same jury, as it is held in (a) 18 Ed. 3. 13 a. And it seems the statute of *Magna Charta* was but an affirmance of the common law; for Glanville, who wrote in the time of Hen. 2. lib. 9. cap. 11. saith, *est autem misericordia Domini Regis, qua quis per juramentum legalium hominum de vicineto catenus amerciandus est, ne aliquid de suo honorabili contenmento amittat*. And Fleta, lib. 1. cap. 48. recites the statutes of *Magna Charta*, and Westm. 1. *Liber homo non amercietur, &c. nisi per sacram' parium suorum, viz. probor', et legal' hom' de vicineto, qui facultatum suarum noticiam habeant pleniorum*. And Bracton, lib. 3. cap. 1. fol. 116 b. says, *de illis qui sunt in misericordia Dom' Regis, et non sunt amerciati, ad hoc videndum qualiter quis sit amerciand'.* Et sciendum est, quod Miles et liber homo non amercietur nisi secundum modum delicti, secund' quod delictum fuit magnum vel parvum et salvo contenmento suo; mercator vero non nisi salvo merchandiza sua: et villan' autem, non nisi salvo wainagio suo: et hoc per judicium proborum hom' de vicineto qui affidabunt simul cum serviente. Comites vero vel Barones *non sunt amerciandi, nisi per pares suos, et secundum modum delicti, et hoc per Barones de scaccario, vel coram ipso Rege. †Clericus vero non amercietur secundum beneficium suum ecclesiasticum, sed secundum quantitatem laici feodi sui, et secundum modum delicti: et ad hoc fideliter faciendum affidabunt amerciatores quod neminem gravabunt per odium, nec alicui deferent propter amorem, et quod celabunt ea quæ audiverunt. Vide 38 Ed. 3. 31 a. (b) 9 Hen. 6. 2 b. 19 E. 4. 9 a. 21 Ed. 4. 77 b. An earl, baron, or bishop, shall be amerced 100s. and 19 Ed. 4. 9. A duke to 10l. Vide (c) 1 Hen. 6 7 b. in the Earl of Northumberland's case. Note, that although the statute of *Magna Charta*, cap. 14. be in the negative, *Comites et Barones non amercientur nisi per pares suos, et non nisi secundum modum delicti*, yet (d) usage hath reduced it to a certainty. But note, Reader, as to amerciements, this difference between amerciements in actions real or personal, of the demandant or tenant, &c. or upon a presentment or indictment, as for not repairing a bridge, or a highway, &c. and the like; for as it is aforesaid, such amercements, according to the said acts, ought to be affeered *per pares*; and amercements of any who hath administration of justice, or of any officer or minister who hath the execution of the King's writs, &c. for such amercements shall be affeered (assessed) by the Justices or Judges of the Court where the cause depends. And there are two reasons of this difference. 1. The later sorts of amercements are out of the said statutes of *Magna Charta* and Westm. 1. for two reasons. 1. The words are

(a) 11 Co. 43 b.

[* 40 a.]

† F. N. B. 76 b.

(b) Br. Amercement 2, 47.

Br. Nonsuit 62.

Br. Amercement 48. 6 Co.

45 a. 54 a. 2

Inst. 28.

(c) Br. Amercement 33. 11

Co. 43 b.

Difference between

amerciements in

actions real

or personal,

and indict-

ments, &c. and

the reasons

thereof.

(d) 2 Inst. 23.

(a) 2 Inst. 27.

Second reason
of the differ-
ence.

3 Salk. 33.

[* 40 b.]

(b) Br. fine
pour Contempt
39. Br. A-
mercement 45.

(a) *liber homo non amercietur*, &c. extend to private men, and not to those who have administration of justice, nor to officers or ministers who have execution of the King's writs, &c. 2. The words are, *per sacram' proborum et legalium hom' de vicineto*, which may have knowledge of the abilities of the parties, as Fleta saith: but that doth not extend to the offences of commission or omission done by those who have administration of justice, or by officers and ministers who have execution of writs, &c. which offences are done to the Court itself, and therefore by the Court ought to be assessed and assessed. The second cause of the said difference is, *quia eventus judiciorum sunt incerti*, and the plaintiff or defendant may have a probable cause of suit or defence until he hears what the adverse party can allege and prove to the contrary; and therefore it is great reason that such amercements which arise upon such causes should be assessed *per pares* in the country, according to the said statutes, and not by the Court. But the offence of one who hath the administration of justice, or of an officer or minister who hath execution of the King's writs, in point of his office, is *malum in se*, and hath not any probability or colour of excuse: and yet both the kinds of amercements are styled with this word, *sc. misericordia*, because whosoever hath the assessing of them, ought *to use great moderation: and this difference appears in our books, and therefore in 22 Ed. 3. 2 a. John of London's case, in a false judgment, if the judgment be reversed, the suitors, who were the judges, shall be amerced, and this amercement shall be assessed by the justices, for the suitors had the administration of justice; and therewith agrees the Book of Entries, *titulo False Judgment*, pl. 13. *Et quod sectatores curiæ prædictæ sunt in misericordia, quæ afferatur per Curiam domini Regis, hic ad*, &c. And if the sheriff returns *cepi corpus*, and hath not the body at the day, the entry is, *ideo idem vicecomes in misericordia, et afferatur per Justiciarios hic ad*, &c. And therewith agrees the Book of Entries, *Capias* 19, 20. So if a writ be delivered of record to the sheriff to be executed, *et Vicecomes non misit breve*, the record saith, *ideo Vicecomes in misericordia, et afferatur per Justiciarios ad*, &c. and this appears in the said book, *Record* 2. So if *Habeas Corpus* be directed to a sheriff, gaoler, or keeper of a prison, &c. and he brings not the body, &c. the entry is, *ideo idem A. in misericordia, et afferatur per Justiciarios ad*, &c. *Et sic de similib'* And in *lib. 5 E. 4. 6 a.* it is resolved by the Justices, that that which is assessed on an officer or minister of the Court is called an amercement, and not a fine; but on a stranger to the Court for a (b) misdemeanor it is called a fine, and not an amercement. But upon a nonsuit in a real or personal action, or bar to the defendant or plaintiff, or judgment against the tenant or defendant, the entry is *ideo in misericordia generally* (c), and that ought to be assessed *per pares*, F. N. B. 76. So if A. be amerced on a presentment, for not

(c) Vid. note (a) to *Vaughan's case*, Vol. III. p. 100.

repairing a bridge, or a highway in a leet; *ideo A. in misericordia, et amerciamantum inde afferatur perafferatores in eadem Curia adtunc electos et juratos ad, &c.* Vide the Book of Entries, title Trespass in Amercements. 2. So if one be amerced for default of suit at a leet, the amercement ought to be assessed *per probos et legales homines*, Book of Entries, *Repl' Amercement* 2 (n). And as to the said book of (a) 10 E. 3. 9. it appears that the amercement was assessed, but it doth not appear by whom it was assessed or assessed, and therefore it shall be intended to be done by the steward †; for in truth it was a fine; and it is to be known, that if a jury, or a leet, tax an amercement, it is sufficient without other afferment; for the amercement is the act of the Court and the afferment of the jury, and therewith agrees 8 H. 7. 4. Vide 7 Ed. 3. 15 b. Astelie's case. 45 Ed. 3. 26 b. 27 a. But if the steward afferes an amercement upon the presentment of the jury, it is void, and shall not bind, vide 45 Edward 3. 27. But the Court shall assess fines (e); and they shall not be assessed by any others, unless it be in special cases; and that not only upon contempts and misdemeanors done in Court, but upon writs of *Capias pro fine*, or upon confessions, &c. as appears Trin. 22 Henry 7. Rot. 510. *in Communi Banco, where he who was taken by *Capias pro fine* prayed that he might be admitted *ad finem suum cum dom' Reg' faciend'*, et *admittitur pro 5s. solut' hic in cur' ad manus J. R. Cler' Rob' Read capit' justic' dom' Reg' hic in partem solut' pro reparatione et emendatione cistarum pro record' de Banco hic in eisdem custod' ordinat' ex præcepto curiæ.* And Trin. 4 H. 8. Rot. 306. in the like case, et *super hoc fines eorundem T. et J. occasione præd' afferatur per justic' hic ad 2s.*, &c. But if a juror appears, and is adjourned upon a pain, and makes default, in that case, because he shall be fined according to the yearly value of his land, it shall be enquired of by the other of his companions of the jury; for in such case the Court cannot know it, and therewith agrees 4 Ed. 4. 6. and 9 H. 4. 5. (b) Vide 20 Ass. pl. 11. And (c) *finis dicitur quia finem litibus imponit*, and is not traversable, as it is held in 7 H. 6. 13 a. i. e. the party redeems his offence for a sum of money, and which makes an end of it, and of his imprisonment for it, and for that reason it is called also Redemption, as appears in the Judicial Register 31. *ad satisfac' nobis de redemptione sud pro quadam transgress.*, &c. And this writ is called *Capias pro fine*, which fine is expressed in the writ by this word Redemption; and the statute of Marlebridge, cap. 3. (d) *non ideo puniatur dominus per redemptionem*, i. e. *per finem*. Another convicted of a recaption before the sheriff in the county shall only be amerced, but if convicted in the Common Pleas, he shall be fined.

An amercement for default of suit at a leet ought to be assessed *per probos et legales homines*.

(a) 10 E. 3. 9.
10. Ante 39 a.
11 Co. 43 a.
1 Roll. Rep. 73.
† Cro. Eliz.
748.

The Court shall assess fines; and they shall not be assessed by any others, whether in cases of [* 41 a.] contempts and misdemeanors done in court, or upon writs of *Capias pro fine*, &c.

(b) Br. amercement 55, 60.
Br. Challenge.
109. in Fine.
(c) Co. Lit.
120 b. 262 a.
3 Bulst. 144.
Hard. 121.

(d) 2 Inst. 105.
8 Co. 60 b. 120.

A man convicted in

(n) Contra *Wilton v. Hardingham*, Hob. 129. Acc. *Brook v. Hustler*, 1 Salk. 56. acc. *Matthews v. Carey*, 1 Show. 62. acc. *Baldwin v. Tudge*, 2 Wils. 20. acc. *Stephens v. Howard*, Fitzgib. 46, 108, acc. *Moore v.*

Wicker, Andrews 47. acc. *Griffiths v. Bedle*, W. Jones 301.

(e) Acc. *Blunt and Whitacre's case*, 1 Leon. 242.

(a) 11 Co. 43 b.
Post. 60 b.
120 a. F. N. B.
73 d.
(b) Post. 60 b.
120 a.

The jurors of the leet have conusance of those offences which are done out of court, and power to present them and to assess an amercement for them: but the steward hath conusance of contempt and misdemeanors in court before

[* 41 b.] himself, and may impose a fine for them, and thereof need not make enquiry. For an amercement for offences out of court, and for fines imposed for offences done in the court, a distress shall be incident of common right. The lord may sell the distress.

(c) Cr. Jac. 382. 1 Roll. Rep. 201. Cr. Car. 533. 1 Roll. 665. (d) Cr. El. 241. Dyer 233. pl. 14, 211. pl. 31. Owen 113. Moore 470. Cr. El. 581. 2 Roll. Rep. 3. Cr. Car. 567. 1 Roll. Rep. 33, 34. (e) 11 Co. 45 a. 1 Roll. 665. 1 Roll. Rep. 201. Dr. & Stud. 74 a. Cr. Jac. 382. 3 Black. Com. 8vo. 14. † Jenk. Cent. 219. 12 Mod. 330.

difference is, if a man be convicted before the sheriff in the county, of a (a) recaption, he shall be only amerced, but if he be convicted thereof in the Common Pleas he shall be fined; and the reason of this difference is, because the county court is not a court of (b) record, and therefore cannot impose a fine; for no court can fine but such court which is a court of record. *Vide* F. N. B. 73 d. And by these differences you will the better understand your books, which are plentiful in these matters. As to the third point it was objected, that for an amercement of things presentable in the leet, the lord may (c) distrain, but not for a fine imposed by the steward; but of that an action of debt lies. To that it was answered and resolved that there are two manner of offences, some done out of court and some done in court; of those which are done out of court, the jurors of the leet have conusance, and therefore power to present them, and to assess an amercement for them; but for contempts (d) and misdemeanors in court before the steward himself, he hath conusance of them, and therefore may impose a fine for them, and thereof need not make inquiry; so that those who have conusance of the thing are fit to impose a fine or amercement for the same thing; and if for the less, *scil.* for an amercement of offences out of court, a (e) distress shall be incident of common right; *a fortiori*, for fines imposed for offences done in the very court *a distress (F) shall be incident, *quia quod licitum est pro minore, et pro majore licitum est*; and a fine is more than an amercement, and both imposed by authority of the leet: and as nothing is more naturally to be punished by the court leet than offences committed in the court itself; so for no sum imposed for any offence, by authority of the leet, a distress is more incident than for such as imposed for offences done in the leet itself. *Vide* 8 Rich. 2. Avowry 194. 41 Ed. 3. 26. 45 E. 3. 8. 47 E. 3. 12. 2 H. 4. 24. 11 H. 4. 89. 7 H. 6. 12. 10 H. 6. 7. 12 H. 7. 15. 3 H. 7. 3. 21 H. 7. 40. F. N. B. 100. 23 H. 8. Br. Leet. 37. And it would be hard to drive the lord to his action of debt for every small fine or pain, but the lord may distrain and sell † them, or distrain and put them in the pound, at his pleasure.

(*) In *Pierson v. Ridge*, 1 Vent. 105. the Court inclined to the opinion, that though of common right a distress may be taken for a fine in a Court leet, that is, where it is imposed for such things as are of common right incident to its jurisdiction, as for contempts or the like; yet, where custom only enables them to set a fine, it cannot be distrained without custom also. In *Fletcher v. Ingram*, 1 Salk. 175. S. C. [1 Lord Raym. 70.

Skin. 635.] it was held that, where there was a custom that a person chosen by the jury of the leet to serve the office of constable should serve or forfeit a reasonable penalty to be imposed by the jury at the said leet, the penalty, if imposed, could not be distrained for without a custom. *Vid.* the judgment of Gibbs, C. J. *Clears v. Stevens*, 8 Taunt. 416. S. C. 2 B. Moore 472.

Note, Reader, the said custom, &c. *eligere unum idoneum hominem de inhabitantibus infra manerium ad essendum constabularium*, &c. well agrees with the law ; for the common law requires, that every constable should be *idoneus homo*, i. e. apt and fit to execute the said office ; and he is said in law to be *idoneus* who has these three things, honesty, knowledge, and ability ; honesty, to execute his office truly without malice, affection, or partiality ; knowledge, to know what he ought duly to do ; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently ; and not for impotency or poverty to neglect it ; for if poor men should be chosen to this office, who live by the labour of their hands, they would rather suffer felons and other malefactors to escape, and neglect the execution of their office in other points, than leave their labour, by which they their wives and children live : and the commonwealth consists in the well ordering of particular towns, and order will not be well observed in them but where the officers are *idonei*, i. e. honest, knowing, and of ability. And this word (a) *idoneus* is oftentimes in law attributed to those who have any office or function ; and therefore if a (b) coroner, who is also an ancient officer, be (c) *minus idoneus ad officium illud exequendum*, it is a good cause to remove him. F. N. B. 163, 164. Register 177. i. e. if the coroner be (d) *senio confractus*, aut morbo paralyticus percussus, aut terras et tenementa in eodem comitatu non habet, aut electus est in officio Vicecomitis, &c. for he ought to be chosen coroner, *qui melius sciat, et possit officium illud intendere*, as appears by the words of the writ *De coronatore eligendo*, F. N. B. 163. Register 177. And so he who is constable ought to be *idoneus*, i. e. *qui melius sciat, et possit officium illud intendere*. And in letters patent of incorporating of inhabitants of a town *into mayor, or bailiff and burgesses ; the words are, *Quod ipsi de seipsis eligere possunt unum hominem idoneum*, or, *duos homines idoneos*, &c. and the law requires, that he whom the patron presents to a benefice be *persona idonea*, for the words of the writ of *Quare impedit* are *Presentare idoneam personam ad ecclesiam de &c. et proprie dicuntur idonei, qui possunt et volunt in ecclesiis deservire, scil. qui moribus, honestate, et literarum scientia, sunt decorati*. And if one be elected constable who is not *idoneus*, he by the law may be discharged of his office, and another man who is *idoneus* appointed in his place.

Who ought to be a constable, &c. vid. Burn's Justice, Constable II.

- (a) 5 Co. 57 b.
2 Inst. 631,
632.
(b) 5 Co. 57 b.
(c) F. N. B.
163 n.
(d) F. N. B.
163 n.

[* 42 a.]

[42 b.]

WHITTINGHAM'S CASE,

Hil. 45 Eliz.

WHITTING-
HAM'S CASE.
Pt. VIII.—42 b.

If there be lord and infant tenant, and the infant makes a feoffment in fee, and executes it by livery of seisin by his own hands, and afterwards dies without heir, the lord shall not take benefit of any escheat in that case.

But if the feoffment be executed by letter of attorney, it is void, and the land shall escheat.

Privies in blood shall take benefit of infancy.

Privies in estate (unless in some special cases) shall not take advantage of infancy.

There is a difference between a title of entry by reason of a condition and a right of entry by reason of infancy. None shall take benefit of the infancy of his ancestor, but he who has a right descended to him from the same ancestor: but the heir may take benefit of a condition, although no right descends from the same ancestor.

Privies in law shall never take benefit of infancy.

If the estate of the infant had been upon condition to be performed by the infant, and the condition had been broken during his minority, the land had been lost for ever.

Note, *The differences between conditions in fact and conditions in law.*

Note, *That a condition in law by force of a statute which gives a recovery is stronger than a condition in law without a recovery.*

Carth. 43.

THE case in the star-chamber, Hil. 45 Eliz. was, that Richard Whittingham was seised of three messuages, &c. in Crayford, in the county of Kent, held of the Queen in socage, as of the manor of Newberry in Crayford in fee; and by his will in writing devised them to Prudence, his bastard daughter, and her heirs, and died. Prudence being within age of 21 years, by deed, as was pretended, did enfeoff Stephens and others of the said tenements in fee, and died within age without issue; and whether this feoffment should prevent the Queen of her escheat was the question. And on consideration had with the two Chief Justices, it was resolved, that if there be lord and (a) infant-tenant, and the infant makes a feoffment in fee, and executes it by livery of seisin by his own hands, and afterwards dies without heir, that the lord

(a) Dyer 10.
pl. 38. 4 Co.
125 a. 7 Co.
7 b. Post. 45 a.
2 Inst. 483. 49
E. 3. 13 a. 39 H. 6. 42 b. 7 H. 5. 9 b. 3 Bulst. 272.

should not take benefit of any escheat in that case (A).

And as to that, it is to be known, that there are three manner of (a) privities; *scil.* privy in blood; privy in estate; and privy in law. Privies in blood are meant privies in blood inheritable, and that is in three manners, *sc.* inheritable as general heir; inheritable as special heir; and inheritable as general, and special heir. Privies in estate are, as joint-tenants, husband and wife, donor and donee, lessor and lessee, &c. Privies in law are, when the law, without blood or privy of estate, casts the land upon one, or makes his entry lawful; as the lord by escheat, the lord who enters for mortmain, the lord of a villain, &c. And, first, privies (b) inheritable, as general heir, shall take benefit of infancy; and therefore if an infant, tenant in fee-simple, makes a feoffment and dies, his heir shall enter.

*The same law of him who is heir general and special. As if a man gives land to one and the heirs male of his body, and the donee within age makes a feoffment in fee, his son, who is heir general and special, shall enter: the same law of him who is special heir, and not general; as if in the same case the donee had issue two sons, and the elder had issue a daughter, and the donee died, and the elder son, within age, made a feoffment, and died without issue male, the younger is special heir *per formam doni*, and shall avoid his brother's feoffment, although he be not general heir, because he is privy in blood, and has the land by descent: so if lands be given to one, and the heirs (c) females of his body, and the donee having issue a son and daughter, makes a feoffment within age and dies, the daughter being heir special, (to whom the right of entry descends) shall enter, and not the son, who has nothing by descent: so of the heir in (d) Borough English; for in all cases, when any claims by descent, as special heir, he shall take benefit of a right of entry, which descends to him, for the infancy of his ancestor: the same law if his ancestor were *non compos mentis* at the time when he made the feoffment, because in these and the like cases the heir general cannot enter, because no right or title descends to him, but the right descends to the special heir. So if tenant in tail, within age, makes a feoffment in fee, and is (e) attainted of felony, in that case the issue shall enter for the infancy, yet he is not general heir, for the blood is corrupted.

Also privies in (f) estate (unless it be in some special cases) shall not take advantage of the infancy of the other. And therefore, if donee in tail within age makes a feoffment in fee, and dies without issue, the donor shall not enter, because

infancy. (d) Co. Lit. 373 b. (c) Co. Lit. 337 a. Palm. 254. (f) 4 Co. 124 a. 1 Roll. Rep. 401, 442. 3 Bulst. 272. 2 Inst. 483. Contra 6 H. 4. 3 b.

There are three manner of privities, *scil.* privy in blood; in estate; and in law.

(a) Co. Lit. 271 a. 1 Jones 32. 3 Co. 23 a. 4 Co. 123 b. 124 a. 2 Inst. 516, 517.

Privies inheritable as general heir, shall take benefit of infancy.

[*43 a.] (b) 3 Bulst. 272. 2 Inst. 483. 1 Roll. Rep. 401. Palm. 234, 254. 6 Mod. 122.

(c) Co. Lit. 337 b.

In all cases when any claims by descent as special heir, he shall take benefit of a right of entry which descends to him for the infancy of his ancestor; same law if the ancestor were *non compos*, &c.

Privies in estate (unless in some special cases) shall not take advantage of

1 Roll. Rep. 401,

(A) Recog. acc. Per the Lord Keeper, *Burgess v. Wheate*, the *Attorney-general v. Wheate*, 1 Eden. 243. in which case the Lord Keeper observed, "The law seems to have had no regard to the tenant's right to the land, but only to his right of

"seisin; and therefore in every case where
"the tenant was seised *de jure*, no escheat
"could happen on the death of that person
"without heirs who had undoubted right
"to the land."

(a) Co. Lit. 337
b. 39 H. 6. 42 b.
1 Roll. Rep. 401.

(b) 1 Roll. Rep.
401. Lit. sect.
633, 634. Co.
Lit. 337 a.
Palm. 254.
21 E. 3. 50 a. b.
(c) Lit. sect. 3.
sect. 64. Lit. fol.
142 a. b. Co.
Lit. 337 a.

[* 43 b.]
Co. Lit. 357 b.

Co. Lit. 634.

If an infant tenant in tail make a feoffment in fee, and die without issue, his collateral heir cannot enter to avoid the feoffment.

(d) 1 Roll. 676,
677.

(e) Co. Lit. 336
b.

(f) Lit. sect.
633. Co. Lit.
336 b. 337 a.
Lit. 142 a.
Palm. 254.

(g) Co. Lit. 336
b. 337 a.

there was privity betwixt them only in estate, and no right accrued to the donor by the death of the donee. So if (a) two joint-tenants be in fee, within age, and one makes a feoffment in fee of his moiety, and dies, the survivor cannot enter by reason of the infancy of his companion, for by his feoffment the jointure was severed so long as the feoffment remains in force; and therefore in such case the heir of the feoffor shall have *dum fuit infra ætatem*, or shall enter into the moiety: but if (b) two joint-tenants be within age, and they join in a feoffment, in such case a joint right remains in them; and therefore if one dies, the right shall survive, and the survivor shall have the right of the land as from the first feoffor: and thereof, I conceive with Littl. cap. (c) Discont. 44. that the survivor may enter in respect of the right accrued to him; otherwise this mischief will follow, that the heir of that feoffor who died cannot enter, because the right doth survive, nor shall *the survivor enter, because he shall not take benefit of the infancy of his companion; but that the survivor shall be driven to his writ of right, which without doubt he may have, because, after the feoffment, the joint-tenants might have joined in it. And if the husband within age makes a feoffment in fee and dies, the heir of the husband cannot enter to avoid this feoffment, because nothing descended to him from the husband: for the law doth not respect what estate the ancestor gives, but what estate he had before the gift, and what right and title the ancestor leaves to descend to his heir: and therefore if an infant be tenant in tail, and makes a feoffment in fee, and dies without issue; his (d) collateral heir cannot enter to avoid this feoffment; for although by his feoffment he gave fee simple, yet when he died without issue, nothing descended to the heir, in respect of which he could enter (e): so if lands be given to one and the heirs females of his body, and he has issue a son, and makes a feoffment in fee, and dies within age without issue female, the son shall not enter in this case for the said infancy, because no right descended to him. So if an infant be tenant *pur (e) autre vie*, and makes a feoffment in fee, and *Cestuy que vie* dies, the infant or his heir shall never enter upon the feoffee, but he in reversion or remainder: but forasmuch as the infant himself, during his life, might have entered upon the feoffee in the right of his wife only, and not in respect of any right which he himself had, it seems reasonable with Littleton, fol. 43. that the wife in the said case, when the (f) husband within age makes a feoffment in fee, may enter in her own right, in which right her husband might have entered; and *eo potius*, because the husband's heir cannot enter: but if the husband within age takes a wife tenant in general tail, and makes a gift in tail to another, by which he gains a new reversion in fee, there the entry is given to the wife for the cause aforesaid, *i. e.* that the husband might have entered in her (g)

(b) In *Zouch v. Parsons*, 3 Burr. 1807. Lord Mansfield said, "There is no difference in this respect between the heir in

"tail and the remainderman; neither claims
"under him whose act is in question, but
"both claim *per formam doni*."

right; also the heir of the husband who has the new reversion defeats the estate tail given by the infant, presently the new reversion by act in law vanishes from the one, and vests in the other, (a) and the wife by operation in law shall be presently seised of her ancient estate; for when the estate tail is defeated, which was the cause of gaining the new reversion, the heir cannot have the estate which his ancestor had before the gift; for his ancestor before the gift had nothing, but in the right of his wife, which determined by his death, as it is held in † 4 H. 6. 2. where the case was, that a man seised of certain lands in the (b) right of his wife, made a feoffment thereof by deed indented to certain persons, upon condition *that they should lease the lands again to the husband and wife for their lives, with divers remainders over in tail, the remainder to the right heirs of the husband, and afterwards the husband died, the feoffees leased the land to the wife for life, with remainders over in tail, the remainder to the right heirs of the wife, where it should be to the right heirs of the husband: and in that case it is resolved, that for the condition broken, the (c) husband's heir might enter; for although no right descended to him from the husband, whose estate determined by his death, yet the title of condition, which he himself created on his feoffment, and reserved to him and his heirs, should descend after his death to his heir; and so a difference between a title of entry by reason of a condition, and a right of entry by reason of infancy; for none shall take benefit of the infancy of his ancestor, but he who has a right descended to him from the same ancestor; but the heir may take benefit of a condition, although no right descends to him from the same ancestor. Three other points are in a manner resolved in the said case of (d) 4 H. 6. 1. That when the husband's heir enters for the condition broken, thereby the feoffment which made the (e) discontinuance is defeated, and by consequence, the discontinuance itself is defeated: 2. That after the heir of the husband hath entered for the condition broken, the estate of the heir vanishes (c) and the estate is (f) immediately revested in the wife, without entry or claim made by her; for the heir enters by force of the condition, and not in respect of any right; and there two cases are put to prove it: 1. If tenant for life makes a feoffment in fee upon condition, who enters for the condition broken, now the feoffment is avoided, and by consequence the reversion presently by the entry revested. 2. If the husband himself had entered for the condition broken, it had revested the estate in the wife. The third point observable in the said case of (g) 4 H. 6. is, that although the wife had accepted an estate for life, and so concluded herself by acceptance to have any *Cui in vita*, yet when the estate which she had taken is defeated by the con-

(a) Co. Lit. 336 b. 202 a.

Husband seised in right of his wife makes a [* 44 a.] feoffment by deed indented; on condition the husband dies, the condition is broken; the heir may enter, and after his entry his estate vanishes, and the estate is immediately revested in the wife.

(b) Co. Lit. 232 a. † 4 H. 6. 2 a. b. Fitz. Entre congeable 1. Br. Entre congeable 38. Br. Condit. 71. Br. Discontinuanee 8. (c) Co. Lit. 336 b. 202 a. Fitz. Entry congeable 1. Br. Entry congeable 38. Br. Condit. 71. Br. Discontinuanee 8. (d) 4 H. 6. 2 b. 3 a. b. (e) Br. Discontinuanee 8. (f) Co. Lit. 202 a. 336 b. Lit. sect. 632. (g) 4 H. 6. 2 b. 3 a. b.

(c) Vid. the judgment of Abbott, C. J., in *Doe v. Bateman*, 2 Barn. and Ald. 168., in which case it was held, that where A., being possessed of a term of years, demised his

whole interest to B., subject to a right of re-entry on the breach of a condition; he might enter for the condition broken, although he had no reversion.

Privies in law, as lord by escheat, &c. shall not take benefit of the privity of infancy.

(a) Palm. 254. 7 Co. 7 b. 4 Co. 124 a. 1 Roll.

[* 44 b.]
Rep. 401, 442. 22 H. 6. 27 a. Br. Entry congeable 129. Palm. 234. 3 Bulst. 279. 2 Inst. 483.

If the estate of the infant had been upon condition to be performed by the infant, and the condition had been broken during his minority, the land had been lost for ever.

Differences between conditions in fact and in law.

(d) 3 Bulst. 59.

(e) Hard. 11. 1 Roll. Rep. 198.

(f) Hard. 11. Co. Lit. 233 b.

(g) Co. Lit. 233 b.

Hard. 11, 32. Cr. Car. 556.

Co. Lit. 3 b. Carth. 43.

(h) 1 Roll. 151. Co. Lit. 233 b.

Godb. 345, 365.

(i) Plow. 364 b. Co. Lit. 233 b.

Co. Lit. 54 a. F. N. B. 591.

(k) Plowd. 364 b. 2 Inst. 401.

(l) 2 Inst. 382. Co. Lit. 233 b.

dition, the conclusion by the acceptance is also avoided. *Vide* Littleton, cap. Discontinuance 43. Privies (a) in law, as lord by escheat, &c. shall never take benefit of the privity of infancy, because he is a stranger to him; and when the infant dies without heir, the feoffment is unavoidable. The same law of (b) coverture, and *Non sanæ memoriæ* (v), and so you will better understand your books in 14 Edw. 3. *Dum fuit infra ætatem* 6 F. N. B. 192. 22 E. 3. 50. *Dum fuit infra ætatem* 2. 18 E. 2. (c) Brev. 831. 39 E. 3. 29. 45 Ed. 3. *49 Ed. 3. 13. 39 H. 6. 42. 34 H. 6. 31. 6 H. 4. 3. 9 H. 6. 6. 7 H. 4. 5. 2 H. 4. 13. 32 H. 6. 27. The Abridgment of the Book of Assises, 87 b. 7 H. 5. 9.

It was also resolved, that if the estate of the (d) infant had been upon condition to be performed by the infant, and the condition had been broken during his minority, that the land had been lost for ever. Note, reader, as to that, it is to be known, that there are (e) two manner of conditions, *scil.* a condition in fact, that is, expressed, as to pay money, or to do, or not to do some other act, &c. and condition in law, that is implied: also conditions in law are of two natures, *scil.* (f) by the common law and by the statute: and conditions in law by the common law are in two sorts, one of which is founded upon a confidence and skill, and the other without confidence or skill. Conditions in law by statute law are also of two qualities, *scil.* when the statute for execution of the condition in law gives recovery, and when the statute gives an entry and no recovery; as to the condition in law, which is founded upon (g) skill and confidence, as the offices of parkership, stewardship, &c. in fee, which descend to an infant, or a feme-covert, if the condition in law annexed to the said offices be broken, it shall bar the infant and feme-covert for ever: the same law of liberties and franchises: but if the infant or feme-covert be lessee (h) for life, or tenant by the curtesy, or tenant in dower, and the infant, or the husband of the wife, makes a feoffment in fee, and the lessor enters for the forfeiture, as he may, yet it shall not bar the infant or feme-covert, but that the infant or feme-covert, after the death of the husband, may enter, for that is by force of a mere condition in law, without any skill and confidence annexed to the estate. If an infant, or a feme-covert, lessee for life, commits waste, and the lessor recovers in an action of (i) waste, it shall bind the infant and feme-covert; for the statute gives the action to recover the land. The same law of (k) *Cessavit*, and of other like cases: as if an infant be Gaoler, and suffers an escape, there an action lies. But if the condition in law be by force of a statute law, which gives an entry, and no action; as (l) if an infant, or the husband seised in the right of his wife, aliens in mortmain, there, although the lord, of whom the land is held, enters; yet the right of the infant or feme-covert is

(v) Vid. note (a) to Beverley's case, Vol. II. p. 570.

not barred, no more than in the case of a condition in law by the common law, which is grounded upon the alienation of the infant tenant for life, or of the husband, &c. where entry to the lessor is given by the common law. And so you will better understand your books in 31 Ass. pl. 17. Br. Covert. 71. Plow. Com. Stowell's case 355. Doctor and Student, lib. 2. fol. 113. *Vide* 13. (31) Edw. 3. Age 54. 14 Edw. 3. 88. 28 Edw. 3. 99. 2 Edw. 2. Age 132. 9 Edw. 3.

*Note, reader, that a condition in law by force (a) of a statute which gives a recovery, is stronger than a condition in law without a recovery; for (b) if lessee for life makes a lease for years, and afterwards enters into the land and commits waste, and the lessor recovers in an action of waste against the lessee for life, he shall avoid the lease for years, made before the waste committed (c): but if lessee for life makes a lease for years, and afterwards enters and makes a feoffment in fee, the lessor shall not avoid the lease for years. So if the tenant makes a lease for years, and afterwards is attainted of felony, or dies without heir, the lord by escheat, although he recovers by writ of escheat, shall not avoid the term. But afterwards it appeared in the principal case, that the said supposed feoffment of the said Prudence was executed by letter (d) of attorney made by the said Prudence; wherefore it was resolved, that it was void, and that the land did escheat to the Queen.

cheat. (b) Co. Lit. 233 b. (c) Co. Lit. 333 b. Vin. Ab. Estate F b. 7. (d) Ante 42 b. 2 Inst. 483. 9 Co. 76 b.

See Cro. Car. 7.
Savernv. Smith.

[*45 a.]

A condition in law by force of a statute which gives a recovery is stronger than a condition in law without a recovery.

(a) Co. Lit. 233 b. 12 E. 4. 21. per Litt.

The supposed feoffment having been executed by letter of attorney, is void, and the land shall es-

JEHU WEBB'S CASE,

[45 b.]

Mich. 6 Jacobi 1.

In the Common Pleas.

A grant of the office of the King's Tennis-plays in Westminster, &c. shall be taken to mean the tennis-plays for the King's household, and not simply for the tennis-play when the King himself plays in his royal person.

In an assise to recover the seisin of such office, the plaintiff averred that the office was an ancient office, but did not shew that any profit belonged to the office; upon exception taken, the plaintiff was held to be good. In what cases an assise lies by the common law, and in what by statute West. 2. c. 25. vid. the Entry, Co. Entr. 60. pl. 1.

WEBB
v.
KNYVET.
Pt. VIII.—45 b.

JEHU WEBB brought an assise against Sir Thomas Knyvet, 5 East. 241.
Knt. Lord Knyvet, John Freeburne, and Roger Rolles, *de*

libero tenemento suo in Westminster, and made his plaint *de officio magistr. ludorum pilarum palmarium* (*Anglicè*, the office of the Master of the Tennis-plays,) *domini Regis nunc* in Westminster; and for his title said, *Quod officium præd', est antiquum officium in Westm' præd', quodque dominus Rex nunc* 27 Nov. anno 5. by his letters patent, &c. *ex certâ scientiâ et mero motu dedit et concessit eidem Jehu præd' officium Magist. ludorum pilarum palmarium tam infra palatium de West' præd', quam alibi dicti dom' Regis nunc Angliæ, habend' et gaudend' præd' officium eidem Jehu, &c. durante tempore vitæ ipsius Jehu, &c.* by force whereof the said Jehu was seised of the said office, with the appurtenances, for his life, and that he took and received the profits thereof to his own use, until the defendants wrongfully, and without judgment, disseised him, &c. and the defendant pleaded, no wrong, no disseisin. And upon the evidence to the recognitors of the assise in this term, it was held *per totam curiam*, that where the grant was in English, of the office of the King's Tennis-plays in Westminster, &c. that this grant should be taken in a reasonable sense; that is to say, the tennis-plays for the King's household, and not only for the tennis-play when the King himself plays in his royal person; for the King is the head of his household, and therefore *a digniori parte*, the tennis-plays for his household, may well be called the King's tennis-plays: so where a commission is made to take boys singing in cathedral churches, &c. or other places where children are taught to sing, to furnish the King's chapel, these general words by construction of law, have a reasonable intendment, *scil.* that such boys as are brought up and taught to sing, to seek and get their living by it, may be taken for the King's service, and it will be a good preferment for them to serve the King in his chapel: but the son of a gentleman, or any other, who is taught to sing for his ornament, delight, or recreation, and not thereby to get his living, cannot be taken against his will, or the consent of his parents or friends; and so it was resolved by the two Chief Justices, and the whole Court of Star-chamber, anno 43 Eliz. in the case of one Evans, who had by colour of such letters patent taken the son of Clifton (a gentleman of quality of Norfolk) who was taught to sing for his recreation; which Evans, for the said offence, was grievously punished. And in the case at bar, divers questions were moved, in what cases an (a) assise lay by the common law, and in what by the stat. of Westm. 2. cap. (b) 25. It is to be observed, that at the common law there was but two forms of writs of assise of Novel disseisin, *scil.* *Assise de libero tenemento*, and *Assise de communiâ pasturæ* for his cattle, &c. which was so (c) necessary, that without it his freehold could not be manured, and therefore it appears in 35 Ass. pl. 11. 4 Ed. 2. Ass. 451. 11 Hen. 6. 22 a. and other books; that *Assise de libero tenemento* lay of land, rent, and all other things whereof a (e) *Præcipe quod reddat* lay at the common law.² But of (f) profits apprender in *certo loco*, the statute of Westm. 2.

The resolution of the Court.

A commission to take boys singing in cathedral

[* 46 a.] churches, &c. must be intended of such boys as are taught to sing as a means of gaining their livelihood.

In what cases an assise lay by the common law, and in what by stat. Westm. 2.

(a) Co. Lit. 159 a.

(b) 2 Inst. 409, 410, 411, 412, &c.

Assise de libero tenemento lay of land, rent, and all other things whereof a *præcipe quod reddat* lay at the common law. The stat. Westm. 2. gave an assise of *Novel disseisin*, in lieu of a *quod permittat*, of profits apprender in *certo loco*. (c) 2 Inst. 411. (d) *Ibid.* (e) *Ibid.* (f) *Ibid.*

cap. 25. gave an assise of *Novel disseisin*, in lieu of a *Quod permittat*, which was the remedy for them at the common law, before the said statute, as is to be seen in 4 Ed. 2. Ass. 449. 8 Ed. 2. Ass. 335. 16 Ed. 2. Ass. 370. 31 Ed. 1. Ass. 440, &c. And in some case the stat. gives an assise in case where there was not any clear and certain remedy at the common law; for if one had not such profits apprender but for term of his life, it was held, that he should not have a *Quod permittat* for them, because such writ was in the nature of a writ of right, as appears in 30 Ed. 1. *Quod permittat* 9. where in a *Quod permittat* battle was waged (A). *Vide* 4 Ed. 3. 38. 32 Ed. 1. *Juris utrum* 14. F. N. B. 124. B. C. And therefore the stat. saith, *Quod breve assise novæ disseisinæ locum habeat (a) in pluribus casibus quam prius habuit*; and first the statute begins, *Cum proficuis capiendis, colligendis, aut recipiendis in alieno solo, &c. ut in boscis, scilicet, de estoveriis bosci, et proficuo capiend' in bosco*. 2. *De (b) nucib' et glandib' et aliis fructib' in alieno etiam solo colligendis*, which are examples of profits to be taken in woods. 3. *De (c) corrodio*, and of the parts thereof, *quæ pertinent ad victum et vestitum, scilicet *liberatione bladi ac aliorum victualium ac necessariorum*, as apparel, lodging, washing, &c. *in certo loco annuatim recipiend'* which is well explained by this word *recipiend'*; for a corody is properly to be received, and estovers, and the other profits to be taken, *scil. capiend' et colligend'*. So the first profits are, *proficua capiend' seu colligend'*, and the corody, &c. is *proficuum recipiend'*.

In some cases the statute gives an assise where there was not any clear and certain remedy at the common law.

(a) 2 Inst. 411.

(b) 2 Inst. 411.

F. N. B. 78 f.

(c) 2 Inst. 411.

[*46 b.]

4. *De (d) tolneto, (et ut specieb' ejusdem) tronagio, passagio, pontagio (e), pannagio et hiis simil' in certis locis capiendis*. *Tolnetum*, i. e. *theolonium*, Τέλος, Græcè, et Latine vectigal, quod dicitur, a vehendo, quia præstatur de rebus quæ vehuntur, a vehendis mercibus, sic dictum, unde dicuntur vectores qui vehunt, et Bracton, lib. 2. cap. 24. numero 3. *Si cui concedatur talis libertas, &c. quod theolonium et consuetudines capiat*, (which is the word that the statute uses, *scil. capiendis*) *infra libertatem suam de ementibus et vendentibus, &c. Vide Fleta, lib. 1. cap. 47. et nota*, Bracton wrote in the end of Henry the Third, father of King Edward I. and Fleta wrote in the reign of King Edward I. who made the said act. And in the Gospel of St. Matthew, cap. ix. ver. 9. *Jesus transiens vidit hominem sedentem ad telonium*: Mark ii. 14. Luke v. 27. *Vide* 30 Edw. 1. Assise 401. No assise lies of suit to a mill (n), but a writ *De*

Tolnetum.

(d) 2 Inst. 58,

219, 412.

Davis 13 a.

12 Co. 33.

F. N. B. 178 g.

(e) Moor 46.

mill, but a writ *De secta ad molendinum*. Assise lies of the tolls of a mill; so of toll thorough, toll traverse, and toll turn.

No assise lies of a suit to a

(A) By stat. 59 Geo. 3. c. 46. in no writ of right shall the tenant be received to wage battel; nor shall issue be joined, nor trial be had by battel in any writ of right.

(B) For an assise does not lie for a service omitted. So it does not lie for homage, 1 H. 4. 1 b. Nor of a bridge not repaired, or a like nonfeasance, Rol. Ab. Assise L. Nor does an assise lie for not scouring a ditch by which the land is surrounded, *ib.* Assise

does not lie of an annuity or pension, 1 H. 4. 1 b. Nor of a rent reserved out of tithes only. *Holden v. Smallbroke*, Vaugh. 204. Com. Dig. Assise, B. 3. But assise lies of estovers, although the wood be stubbed up, so that there neither is nor can be wood again, *Cowper v. Andrews*, Hob. 43. *Vide* Booth on Real Actions 264. Fitz. Nat. Brev. 183.

† Q.

Tronagium.

† i. e. Poizage.

Passagium; novel disseisin lies not of a way.

Pontagium.

(a) Br. Assise 337. Br. Chimin 8. Br. Pleint in As. 31.

[* 47 a.]

Fitz. Ass. 317.

Pannagium.

(b) Davis 13 a.

b.

Davis 13 a.

(c) Dav. 13 a. b.

Cranage.

(d) Dy. 352. pl. 27.

Stallage, &c.

(e) Dav. 13 b.

Assise of an office lay at common law.

(f) F. N. B. 178. f. Post. 55 a. 2 Inst. 412.

(g) 2 Inst. 412.

An assise lay of all that a

Præcipe quod reddat lay at the common law.

secta ad molendinum, but of the toll of a market an assise lies; and so of the toll of a mill. *Vide* 23 H. 3. + 425. tit. Assise 427. acc. So of toll thorough, toll traverse, and toll turn, and all these a man shall have in his own land; and yet he being disseised of them, shall have an assise of them. *Tronagium est species tolnei, et dicitur a trona*, which signifies a beam with which things are to be weighed, *et proprie tronagium exigi debet de ponderatione lanarum, et pesagium + exigi debet de mercibus*, as appears by a record in the Treasury, Hil. 5 Ed. 3. *Lincoln' numer' 32.* but the one is often taken for the other. And it appears by *Fleta*, lib. 2. cap. 12. which was written in the time of E. 1. in which time the statute was made, that *trona* signifies a beam. *Passagium*, that is properly a ferry for the passage of men and cattle over a water, for which the owner has a toll; for if a man has passage in the barge or vessel of another, to the church, or elsewhere, it is not any profit, but an easement, whereof no assise lies, as it is adjudged in 31 E. 3. Ass. 44. and 19 Ed. 2. Ass. 309. and 34 Ass. pl. 13. an *Assise de Novel disseisin* doth not lie of a (a) way (c), because it is but an easement, and no profit to be taken, *nullum proficuum recipiend'*, as the statute speaketh. (b) *Pontagium*, *pontage*, is a toll for passage or carriage over a bridge, and thereupon it is called *pontage*, as appears 3 Ed. 3. Ass. 445. and F. N. B. 227. and Register 259. *Rex collectoribus, &c. pontag' in villâ de S., &c.* **pannagium* (d) is a toll for the paving of a city, or a causey, or a way, as appears in 3 Ed. 3. Assise 445. F. N. B. 227. Reg. 259. and in old times it was written *pavagium*, or *pauvagium*, or *pavigium*, and by corruption *pannagium*, *scil. nn. for uu, &c.* The statute goes farther, *et his similibus*, as for (c) *murage, scil.* toll for making of a wall for safeguard of men in time of war or tumult, as appears in the said books of 3 Ed. 3. and F. N. B. 227. Register 259. *Cranage* (d) is a toll for drawing of merchandize out of vessels to the wharf, &c. and so called because the instrument is in the form of a crane. *Vide* Dyer 18 Eliz. 352. and the book of Entries 3. So of stallage, (e) *picage*, wharfage, anchorage, *pedagium, a pede dictum, quod a transeuntibus solvitur.*

5. *De (f) officiis, scil. custodiis boscorum, parcorum, forestarum, chacearum, warrennarum, portarum, et aliis ballivis et officiis in feodo, jacet de cætero assisa novæ disseisinæ*; which words (*de cætero*) have persuaded divers, that an assise of an office did not lie at the common law; and so are some opinions in 16 Ed. 2. Ass. 370. and that no assise by the statute lay of any office, but of an office in (g) fee, because the assise came in lieu of a *Quod permittat*, which none could have at the time of making the act, as hath been said, but tenant in fee. *Vide* 4 Ed. 2. Assise 449. and 8 Ed. 2. *ibid.* 358. But it ap-

(c) Assise lies of a way appendant or appurtenant, though not of a way in gross. Fitz. Nat. Brev. 183, 184.

(d) Pannagium is properly a liberty for hogs to feed on acorns, &c. *Note to former Edition.* Vid. Moor. 46.

pears by our books, that an assise lay of an office *ut de (a) libero tenemento*, at the common law, for of all that a *Præcipe quod reddat* lay at the common law an assise lay. 7 Ed. 3. 63 b. in Henry de Parker's case a writ of entry in the *per and cui, de Balivar' custodiendi parcum de Charkell cum pertinentiis*; and 8 Ed. 3. 55 b. 56 a. the Bishop of Salisbury's case, a writ of *Aiel de Bedelria hundredi de Cademinster, et nota there dictum Stoufe*, 10 Edw. 3. 27 b. acc. and 19 Edw. 3. View. 77. *Ad terminum qui præterit* brought *de Bedelria de Soke* of Winchester: and exception was taken, that it was a profit issuing out of no freehold, *et non allocatur (b)*. 18 Edw. 3. 27 a. A *Formedon* of the office of Serjeanty in the cathedral church of Nichol'. *Vide (c)* 27 H. 8. 12 a. 7 H. 6. 8 b. 7 (d) Ass. pl. 12. 10 (e) Ass. pl. 11. the statute saith, office in fee; yet an assise lies of an office, although the disseisee has but an estate for (f) life; for the statute was made as to that in affirmance of the common law, as in 30 Ass. pl. 4. *officium (g) messoris*; 22 Hen. 6. 9 b. the office of (h) packing of cloths, &c. and if the office of sheriff is granted for life, an assise lies of it, 9 Ed. 4. 6 a. b. the office of one of the (i) clerks of the crown in the Chancery, 18 Edw. 2. Assise 377. Assise of the office of the beadle of the hundred (honour) of Westminster and Middlesex, and 4 Edw. 2. Assise 449. and *ibid.* 8 Ed. 2. 385. *the Archbishop of Canterbury by deed *dedit Johanni Porteriam curæ suæ Cantuariensis*, which grant was but for life, and yet an assise lay, 8 Ed. 4. 16 b. an assise of an office (k) in the Common Pleas, 28 H. 8. Dyer 7. and 3 Mar. Dyer 114. an assise lies of the office of a (l) philizer in the Common Pleas, and the post where he sits shall be put in view, 5 Mar. Dyer 153. Assise lies of the office of the (m) Register of the Admiralty, which the plaintiff had for life. Note, although the proceedings in that Court be according to the civil law, yet the offices are determinable by the common law; so of a Register of the consistory of a bishop, 31 H. 8. Br. Grants 131. Assise lieth of the office of steward, bailiff, or receiver of a manor; and all this is meant of offices of (n) profit, and not of an office of charge and no profit, as it is held in 27 Hen. 8. 12. and 31 Edw. 1. Assise 440. *Vide* 21 Edw. 1. 3, 4 b. And where some say in the time of Edward 2. as is aforesaid, that an assise was given by the said statute in lieu of a *Quod permittat*, there is (o) no writ in the register of a *Quod permittat* of an office; and yet I have a Register of Hen. 2. which was long before the said act; and I conceive, that no writ of *Quod permittat* lay of an office, because a *Præcipe quod reddat* lay of it, as before is said; and therefore a man shall have an assise of an office *ut de libero tenemento*, at the common law. And the statute, as to offices, was but a declaration of the common law, as hath been said, and to remove a doubt which then was. And so the said words (*jacet de cætero, &c.*) are to be

(a) F. N. B. 178 f. 2 Inst. 412. Com. Dig. Ass. B. 2.

(b) Co. Lit. 20 a. 1 Roll. 838. 7 Co. 33 b. Nevil's case.

An assise lies of an office, although the disseisee has but an estate for life.

(c) Post. 47 b. 49 b. Br. *Præcipe quod reddat* 1.

(d) Br. Assise 121. Br. Plaintiff, [* 47 b.] &c. 9.

(e) Br. *Præcipe quod reddat* 19.

(f) 2 Inst. 412.

Although the proceedings in the Admiralty Court be according to the civil law, yet the offices are determinable by the common law.

(g) Fitz. Assise 296. Br. Assise 307. Br. Plaintiff, &c. 16.

No writ of *Quod permittat* lay of an office.

(h) Fitz. Assise 10. Br. Assise 76.

(i) Br. Assise 95. Fitz. Assise 2 Brown. 12. 1 Lev. 1. (m) 2 Inst. 412. (n) 2 Inst. 412. Com. Dig. Assise B. 3. (o) 2 Inst. 412.

Although the courts in which the offices are, are removeable, yet if they be in a certain place at the time of the disseisin, it sufficeth.

(a) 2 Inst. 411.
Moor 46. 6
Mod. 118.

(b) Fitz. Plaint
14. Br. Assise
167. Br. Plaint,
&c. 29.

[* 48 a.]
(c) 2 Inst. 409,
410, &c.

(d) Br. Assise
126. B. Plaint,
&c. 10.

There was a special writ in the register for common of pasture, and not for any other common. Dyer 84 a.

(e) 2 Inst. 407.
(f) 2 Inst. 405,
406, &c.

(g) 2 Inst. 412.

† 2 Inst. 412.

intended, that *jacet de cætero absque difficultate*. And it appears by the principal case at bar, and by the said books of offices in the Chancery, King's Bench, and Common Pleas, that although the Courts are removeable in which the offices are, yet if they be in a certain place at the time of the disseisin, it sufficeth: for the words of *proficuo in certo loco capiend'* extend to estovers, &c. and not to the clause of offices. *Vide* 4 Edw. 4. 2. And the statute saith *in omnibus supradictis casibus modo consueto fiat breve de libero tenemento*: so that now of all profits apprender *in certo* (a) *loco*, the writ shall be *de libero tenemento* (e): and the old writ is given in a new case; and therefore in 11 Ass. pl. 13. the writ was general *de libero tenemento*, and the plaint *de quatuor acris saliceti*; that is, four acres of (b) willows, and to have reasonable estovers in one hundred acres of wood, *scil.* housebote and haybote: and the plaint was challenged, 1. Because the plaint ought not to be *de quatuor acris saliceti*, but *terræ* or *prati*. 2. Because the plaintiff had joined in one plaint two freeholds, one, *scil.* the four acres of willows at the common law, and the other, *scil.* the estovers by the statute, *scil.* *the statute of Westminster 2. (c) cap. 25. *et non allocatur*. And there it is said, *Quod isto termin'*, a plaint of two rents service was adjudged good, for *liberum tenement'*, although it be in the singular number, yet is *nomen collectivum*. *Vide* (d) 7 Ass. 18. and the statute further saith, *et sicut prius jacuit, et locum habuit in com' pasturæ, ita de cætero locum habeat in com' turbariæ, piscariæ, et aliis com' hiis similib', quas quis habet pertin' ad liberum tenemen', vel etiam sine tenemento per speciale factum ad minus ad terminum vitæ*. And the reason wherefore an assise lay at the common law, of common of pasture, and not of other commons, was, because there was a special writ in the register, for common of pasture, and not for any other common; and in *dieb' illis* they held themselves (e) strictly to the form and order of the register, which is mentioned in the statute of Westminster 2. made 13 Edw. 1. cap. (f) 24. *Vide temp' R. 2. Grants 104.* A man shall not have a writ of Assise, *quod disseisivit eum de libero estoverio*; and yet Bracton held, l. 4. f. 231. *quod* (g) *locum habet assisa de qualibet communia pertin' ad liberum tenementum, sc. communia pasturæ, turbariæ, &c.* and 12 Hen. 3. Assise 417. that an assise lay of common of † piscary, &c. And these opinions had great probability of reason, but because there wanted a writ for them in the register, for that cause before this sta-

(e) So in an assise of tithes the writ shall be general *de libero tenemento*, and the count special; *Dean and Chapter of Bristol v. Clerke*, Dyer 93.; for when a man hath a special remedy at the common law provided for by writ in the register which serves only for one case and for one thing, and afterwards a like remedy is provided by the statute in another case, and for another thing

than there was any help for at common law, the general writ framed shall serve in the new case, and the special matter shall be shewn in the count unless a special writ be expressly provided in the statute. And so also in an assise by a tenant by elegit, statute, &c. the writ shall be *de libero tenemento*. *Ib.*

tute an assise did not lie of them, but a *Quod permittat*; and it appears by Bracton, lib. 5. tract' *De exceptionibus*, cap. 17. fol. 413. who wrote a little before the making of the said act, that original writs cannot be (a) changed, but by act of Parliament. For there he divides writs into three branches. *Sunt quædam brevia formata (id est originalia) seu de cursu*; (which as appears there, were first formed and made by authority of Parliament:) *quædam judicialia ex eis (id est, ex originalibus), sequentia, &c. quædam magistralia, quæ nec sunt de cursu, nec formata, (id est, de aliquâ certâ formâ) et sæpius variant, secundum varietatem casuum factorum et querelarum* (as are actions on the case, actions of deceit, prohibitions, &c. which have not any certain form, &c.) And of writs or originals formed or of course, Bracton wrote divers remarkable things, (b) *Brevia quidem sum sit formatum ad similitudinem regulæ juris, quia breviter et paucis verbis intentionem proferentis exponit et explanat, sicut regula juris rem quæ est breviter enarrat, &c. Sunt (c) quædam brevia formata sub certis casibus de cursu, et de communi consilio totius regni concessa et approbata, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum.* By which it appears, that writs formed, and of course, that is originals were at first authorized by Parliament, and without Parliament cannot be altered or (d) changed, and therewith agree our books, for inasmuch as the original writ of *Assisæ ultimæ præsentationis* was formed in these words, *quis advocatus tempore pacis præsentavit ultimam personam quæ mortua est*, this form shall hold and cannot be changed, although the incumbent resigns, as appears in 18 Edw. 2. *Assise de Durrien presentment* 20, &c. and F. N. B. 31 H. 3. (6). Also the writ of *Warrantia chartæ* is framed in these words, *quod juste, &c. warrantizet B. unum messuagium in D. &c. unde chartam habet, &c.* And yet if he be bound to warranty by force of an exchange, or by (e) homage ancestrel, the form of the writ shall not be altered, 9 Ed. 4. 49 b. 21 (f) H. 6. 8 a., &c. Fitz. Nat. Br. 134. and many other cases may be put upon the same ground. Also Bracton further saith, *communia brevia inter omnes pro jure generaliter observari debent cum sunt originalia, et actionibus originem præsent*; and therewith agrees Fitzherbert in his Preface to his *Nat. Brevium*: "In every art and science there are certain rules and fundamentals, to which a man ought to give credit and belief, and which he cannot deny: in like manner there are divers rules and fundamentals in the knowledge of the common law of the land, to which a man ought to give credit and belief, and not deny them, which are very necessary for those who will understand the said law, especially at the beginning, for upon those (g) foundations the whole law depends; for which cause, in times past, a very profitable book was composed called the Register, which contains divers principles, by which he shall be well instructed who would understand the said laws."

And that was the reason, that forasmuch as there was no formed of assise of *Novel disseisin* of common of turbary, piscary, &c. and therefore no assise of *Novel disseisin* lay of them before stat. 13 E. 1.

Original writs cannot be changed but by act of parliament.

(a) 2 Inst. 407. Co. Lit. 73 b.

(b) Co. Lit. 73 b.

(c) Ibid.

(d) 2 Inst. 407. Co. Lit. 73 b. [* 48 b.]

(e) Dy. 8. pl. 16. 9 H. 7. 2 a. Br. General brief, &c. 13. in medio. Br. General brief, &c. 8. 24 E. 3. 35 b. F. N. B. 134 f. 2 And. 96. (f) Br. Warrantia Chartæ 18.

(g) Co. Lit. 73 b. 3 Co. 38 a.

There was no original writ

- original writ formed of assise of *Novel disseisin*, of common of turbary, piscary, &c. but only of common of pasture, for that reason no assise of *Novel disseisin* lay of them before the said statute of 13 Edw. 1. And with Bracton agrees Fleta, which book was wrote a little after the said act of 13 Edw. 1. *Di-cuntur brevia cum sint formata ad similitudinem regulæ juris quæ breviter et paucis verbis intent' proferent' exponit et ex-planat': sicut regula juris rem quæ est breu' enarrat, &c. Et sunt quædam brevia formata sub certis casibus, et quædam de cursu, quæ consilio totius regni sunt approbatur, quæ quidem mutari non poterint absque eorundem contrariâ voluntate. Sunt et brevia ex eis sequentia, quæ dicuntur judicialia.* And whereas afterwards, at the same Parliament of Westm. 2. 13 Ed. 1. (a) c. 24. it is enacted, et (b) *quotiuscunque de cætero exenerit in Cancell' quod in uno casu reperitur bre', et consimili casu cadente sub eodem jure et simili indigente remedio non reperitur, concordent clerici de Cancell' in bre' faciendo, vel et terminent querentes in proxim' Parliament', et scribantur casus in quibus concordare non possunt et referant eos ad proxim' Parliament' et de consensu jurisperitorum fiat breve ne contingat de cætero quod Curia domini Regis deficiat conquerentibus in justitia perquirenda:* and the preamble of the said 24th chapter was consonant to the conclusion *de cætero non (c) recedant querentes a Curia Regis sine remedio.* By force of which act the writ called the writ *De Ingressu in consimili casu*, was formed by the Clerks of the Chancery, as it is adjudged in 3 E. 2. Entry 8. which was given in the same age that the said act was made, and F. N. B. 206. f. *Vide* 38 E. 3. 13. Note, reader, at the time of the making of the said act, as it appears in Fleta, lib. 2. cap. 13. The Clerks of the Chancery (which are meant in the said act) were grave, wise, and circumspect men, sworn to the King, and of profound knowledge in the laws and customs of England; for the words of the book are, *est inter cætera quoddam officium dicitur Cancellaria quod viro provido et discreto, &c. magnæ dignitatis debet committi, &c. cui associantur clerici honesti et circumspecti, Domino Regi jurati, qui in legibus et consuetudinibus Anglicanis notitiam habeant pleniorē, &c.* And the writs which they form are called (d) *Brevia magistralia*, because these Clerks, for their knowledge, were called *Magistri Cancellariæ*, as those who wrote *Brevia de cursu* were, and yet are called *Cursitorii*. And as the writs which the Cursitors write are called *Brevia de cursu*; so the writs which the Masters draw in difficult cases, are called *Brevia magistralia*. But when such clerks, so knowing of the law, failed, then the Judges, in many cases, gave allowance to ancient forms of writs, and drove the party to make a (e) special count when the writ doth warrant the count in substance, although there be variance in circumstance, as in the said cases of *darrcin presentment*, and (f) *warrantia chartæ*, and many others, the substance of the one is the avoidance, and death or resignation but the circumstance; and in the other warranty is the substance, and the manner of it but the circumstance; but when the case will not bear it, (as in assise *de communia pasturæ*, he
- (a) 2 Inst. 405, 406, &c.
(b) 2 Inst. 407.
- [*49 a.]
- (c) 2 Inst. 406.
- Brevia magistralia, why so called.
(d) 2 Inst. 407.
- (e) F. N. B. 33. b. c.
- (f) 2 And. 96. F. N. B. 134. 1. 24 E. 3. 35 b. Br. Gen. Brief, &c. 8. 7. H. 7. 2. a. 9 E. 4. 49 b. 21 H. 6. 8 a. Br. Gen. Brief, &c. in Medio.

cannot make his plaint of common of piscary, turbary, &c.) then *ultimum refugium* is to refer it *ad proximum Parliamentum*, as the statute speaks. *Nota*, reader, in the said statute of Westm. 2. cap. 24. a little before it is said, *et in registro de Cancellaria non est inventum aliquod breve in isto casu speciali*: and therefore the statute provides remedy in it, by which appears also the antiquity of the (a) register, which is as ancient as original writs, the antiquity whereof see in the Preface to the Third Part of my Reports. And in the principal case, exception was taken to the plaint, because in his title he saith, **quod officium prædictum est antiquum officium in Westm' prædict': quodque prædictus dominus Rex nunc, etc. per literas suas, patentes, etc. concessit eidem Jehu officium magistri ludorum pilarum palmarium, etc. Habend' idem officium eidem Jehu durante vita sua, etc.* And doth not shew that any profit belongs to the said office, and a man shall not maintain an assise of an office without profit, as the book is in (b) 27 H. 8. But it was answered and resolved, that the plaint was well enough: for true it is, that of an office of charge no assise lies, as it is held in 30 Ass. pl. 4. 8 E. 4. 22. and 27 H. 8. 12. and 30 Ass. pl. 4. (c) There assise was brought of the office of Reaper of the manor of D. *cum pertinen'*, and there Shard took a difference between an ancient office and a new office; for in an assise of a new office first erected and appointed, there, the plaintiff ought to shew what fee or profit is granted for the exercising of it, for it cannot have a (d) fee and profit belonging to it, as an ancient office may. And there Burton saith, that their opinion was, that if a man makes plaint of the office, and of the profit, the plaint had abated; for by the recovery of the office, the fee and profit, as parcel of it, shall be recovered; and therewith agrees the book in 8 E. 4. 22 b. where in an assise of an (e) office in the Common Pleas, he made his plaint of the office and fee, and wages and commodities; and Choke excepted against it, because he complained of one thing twice, *scil.* of the office and of the fee: Jenny, who was of Counsel with the plaintiff, We have amended our plaint; for it is but of the office, with the appurtenances. Pigot: Then the plaint is not good: for a man shall not maintain an assise of an office without profit: and the Court held the plaint good as to that; and therewith agree 5 Ed. 4. 3. (f) 22 H. 6. 9. b. 9 Ed. 4. 6. a. b. And it is to be known, that if a man be disseised of the whole office, he shall have an assise *de officio cum pertinentiis*: (g) but if he be disseised of parcel of the profits, he may have an assise of these parcels only, 22 H. 6. 11 b. 13 Edw. 3. Plaint 23. If a man gives me the keeping of his park, taking twopence *per diem*, and a robe, the plaint shall not be of the office or keeping, if I be not disseised of the whole office: but if I be disseised of the robe or fee, the plaint shall be only thereof. And 3 Edw. 3. Assise 175. An assise of novel disseisin was brought, and he made his plaint of a profit apprender, for the keeping of the park and wood of Preston, every day of the year a penny half-penny for his poulterer, and *a robe, and the assise was maintained: and there Scrope held,

Exceptions to the plaint that it does not

[* 49 b.]

show that any profit belongs to the office, held although assise does not lie of an office of charge, yet the plaint is well enough

(a) Co. Lit. 16. b. 73. b. 159. a.

(b) 27 H. 8. 12.

a. Antea 47. a.

Br. Præcipe

quod reddat 1.

(c) Fitz. Assise

296. Antea 47.

a. Br. Assise

307. Br. Pleint,

&c. 16.

(d) Cr. Car. 50,

51.

(e) Fitz. Office

del Court 6.

Fitz. Pleint 4.

Br. Pleint, &c.

19.

(f) Antea 47. a.

Fitz. Assise

Br. Assise 76.

(g) Br. Assise

95. Fitz. Assise.

Antea 47. a.

[* 50 a.]

that if I have a corrody to take four loaves, and four flagons of ale in the week, although they are but one corrody and one freehold, yet if I be disseised only of the bread, I shall not complain of both, *scil.* of the ale and the bread, but only of the bread, otherwise my plaint shall abate; but if I be disseised of two of the loaves only, I shall make my plaint of all the four loaves, with which agree (a) 22 H. 6. 9. b. and 12 Ass. pl. 23. Assise was brought of meat and drink as appurtenant to an office. And in the principal case at bar, the assise found for the plaintiff against Roger Rolls, in *duobus Spharisteriis, Anglice, tennis-courts, quorum unum vocatur, the close tennis-court, et alterum vocatur, the Brake in Westm' præd'* and assessed damages and costs, and acquitted the Lord Knyvet and John Freeborn, of the disseisin of the office aforesaid.

(a) Antea 47 a.
49 b.
Fitz. Assise 70.
Br. Assise 76.

Judgment of
the Court.

Ideo consideratum est quod prædictus Jehu recuperet seisinam suam versus præfatum Rogerum de officio prædicto in prædictis duobus spharisteriis per visum recognitorum assise prædictæ, with damages and costs, et prædictus Rogerus in misericordia, et prædictus Jehu in misericordia pro falso clamore suo versus præfat' Tho. Knyvet et Johannem Freeborn, eo quod ipsi de disseisina prædict' superius acquietati existunt, et prædict' Thomas et Johannes Freeborn eant inde sine die, etc. And it is to be known, that at the common law, the assise was *remedium maxime festinum, et maxime beneficiale: festinum*, for therein the defendant shall not be (b) essoigned, nor cast a (c) protection; also the defendant shall not pray in (d) aid of any but only of the King, neither shall he (e) vouch a stranger not any party to the writ, unless he enters presently into the warranty: the same law of (f) receipt: also the (g) parol shall not demur for nonage, either of the plaintiff or defendant; and in many other respects the assise is *remedium maxime festinum*. It is also *maxime beneficiale*; for in no action at the common law, a man shall recover the land itself and damages, but only in an assise against the disseisor. *Vide* the statute of Gloucester, cap. 1. And in some case a man shall have an assise of novel disseisin at the common law, when he himself is seised of the freehold of the land: as where the lord, &c. doth often distrain, (h) that the terre-tenant cannot manure his land; in that case the terre-tenant may have an assise, and the writ shall be general; but he shall make a special plaint, that the lord, &c. did* often distrain, &c. and the judgment shall not be *quod querens recuperet seisinam tenementorum prædictorum*, for the plaintiff himself is seised of the freehold; but the judgment shall be, that he shall have and hold the land, *absque multiplici districtione, etc.* So in *casu quo quis pascit ulterius separale*, the terre-tenant shall have an assise by the common law. And the statute of Westm. 2. (i) cap. 25. is but an affirmance of the common law; for in the same manner he shall have an assise for fishing in his several piscary or turbary, and the writ shall be general, as appears by the statute. But the plaintiff in his plaint ought to shew, that the defend-

At common law the assise was *remedium maxime festinum*, in which the defendant should not be essoigned, &c. nor the parol demur for nonage, either for the plaintiff or defendant.

+Postea 66 a.
2 Inst. 410.

In some cases at the common law, a man shall have an assise of novel disseisin, when he himself is seised of the freehold of the land.

[* 50 b.]

(b) 1 Roll. 822.
4 Co. 35 b.
6 Co. 4 b.
14 H. 6. 22 b.
2 Inst. 410. 21
H. 6. 42 a.
(c) 21 H. 6. 42
a. 2 Inst. 410.
Plowd. 89.
Br. Protect. 53.
Co. Lit. 131 a.
(d) 2 Inst. 410.
9 H. 5. 14 a.
14 H. 6. 22 b.
(e) 2 Inst.
Inst.
Br.

F. N. B. 78 c. 2 Roll. 745, 748. Plowd. 89 b. Br. Voucher 146. 9 H. 5. 14. a. (f) 2 Inst. 410. (g) F. N. B. 178. 2 Inst. 414. 27 Assise 51. Br. Assise 273. 28 Ass. 50. 1 b. 11 Co. 44 a. Com. Dig. Assise B. 8. (i) 2 Inst. 409, 410, 411, 412, &c.

ant claiming common of pasture in his several grounds, with his cattle, &c. and the judgment shall not be, that he shall recover the seisin of the tenements, &c. but that he shall have and hold them in severalty; for the plaintiff himself is in seisin of the freehold, and therefore he cannot make his plaint to be disseised of his freehold, for it is not so; and then the judgment would not pursue it. *Vide F. N. B.* 178. b. 27 Ass. pl. 20 and 51. 28 Ass. pl. 50. Westm. 2. cap. 25.

SYMS'S CASE.

[51 a.]

Mich. 6 Jacobi 1.

Which began Hil. 5. Rot. 2541.

If tenant in tail with remainder to his eldest sister in fee, levy a fine with warranty, and die without issue, the eldest sister shall be bound by this warranty for the whole, although it descend to her and her youngest sister; for the warranty is entire, and extends to the whole land.

GAME
v.
SYMS.
Pl. VIII.—51 a.

If a man be seised in fee of a house in right of his wife, and a grant be made to him and his heirs, to have estovers to burn in the house, the estovers shall descend to the issue of the husband and wife.

*If a man seised of a house *ex parte maternâ* has a grant of housebote to be burnt in the house, it shall go with the house to the heir *ex parte maternâ*.

Same law in the case of a rent seek, and a grant by the terre tenant to distrain for it.

*If a man seised of land *ex parte maternâ*, makes a gift in tail rendering rent, the new rent is incident to the reversion, and shall go with it to the heir *ex parte maternâ*.*

An estoppel which accrues by admittance of record, shall not conclude the heir who claims not the right, by the same ancestor. Otherwise of estoppels which stand upon recompence. S. C. Cro. Jac. 217.

JAMES GAME brought a *Formedon* in the remainder against William Syms and Mary his wife, and demanded a house, forty-five acres of land, six acres of meadow, &c. in Wethermonford, &c. in Essex, of a gift made by Henry Winter to Stephen his son, and to the heirs males of his body, &c. the remainder to John his son, and to the heirs males of his body, &c. the remainder to Alice Winter, and her heirs; and that the demandant was son and heir to Alice, and that Stephen

and John were dead without issue, &c. The tenant pleaded in bar a fine levied by the said Stephen to William Brown, of the tenements aforesaid; by which he did grant, that he and his heirs *warrant' tenementa præd' cum pertinent', etc. contra omnes homines*; after which fine the said John died without issue, and afterwards the said Stephen died without issue. *Post cujus mortem warrantia ipsius Stephani prædicta in fine prædict' superius specificat' descendebat præfatæ Aliciæ ut sorori et hæredi prædict' Stephani*; and after the descent of the warranty the said Alice died, *post cujus mortem warrantia prædict' descendebat præfat' Jacobo ut filio et hæredi præd' Aliciæ, et petit judicium si præd' Jacob' actionem suam præd' contra warran' præd' habeat, etc.* The demandant confessed the fine aforesaid, &c., and the death of John Winter without issue, and the said Stephen died *prout, etc. sed ulterius dicit quod prædicta warrantia prædicti Stephani descendebat præfatæ Aliciæ sui ut sorori et uni hæredi prædicti Stephani, ac cuidam Thomæ Rampton ut alteri cohæredi præd' Stephani*, and *shewed how, and after the death of the said Alice, the said warranty *quoad un' medietat' tenement' præd' descendebat eidem Jacobo ut filio et hæredi præd' Aliciæ, &c.* Upon which the tenant did demur in law, whether the warranty which descended on both the heirs, should bar the said Alice and her heir for the whole, or but for the moiety, forasmuch as the warranty descended on both, and Alice only had right to the said land, was the question; and it was objected, that it should be a bar but for one moiety, because the warranty doth not only descend on her, but on the other sister: and the case in (*a*) 45 Edw. 3. 23 a. b. was cited, which is abridged by Br. † Garrantie 14. where he abridges the case to this effect: husband and wife, tenants in special tail, to them and the heirs of their bodies, have issue a daughter, the husband discontinues the estate-tail with warranty, and the wife dies; and he took another wife, and had issue another daughter, the husband dies, the elder daughter took husband and they brought a *Formedon*, and the tenant did rebut for one moiety by reason of the warranty and assets, and recovered for the other moiety, for he could not rebut for the other moiety, because the warranty did not descend only on her. But it was resolved by Coke, C. J. *et tot' cur'*, that in the case at bar Alice and her heir was barred for the whole; for the warranty is entire, and extends to the whole land, and is a bar to every person on whom it descends, of all the right which she had in the land; and if each of them had right jointly or severally, each is barred; and if one only had right, and the other nothing, she which had the only right shall be barred of the whole, for as to that purpose the whole warranty descends to each of them (*A*). And therewith agrees

[* 51 b.]

(a) Fitz.Vouch.
73.
Postea 52 a.
† Postea 52 a. b.

Resolution of
the Court.

(A) In *Fowle v. Doble*, 1 Mod. 182. Vaughan, C. J. is reported to have questioned the resolution in Sym's case, and to have observed, "There is a case cited in Sym's case out of the Year Book, 45 Edw. 3. pl. 23., which is expressly against the re-

solution of the case. It is said in the "Reports, (vid. post. 52 a.) That no judgment was given in that case, which is false; and that the case is not well abridged by Brook, which is also false. If in case of a voucher a man loseth his warranty,

a case adjudged in the point in 5 Ed. 2. War. (a) 78. where Sibil brought a *Sur cui in vita*, of the seisin of Margery her grandmother, the tenant pleaded, that the said Sibil is coheir with Elin and Maud, to one Walter their cousin, whose heirs they are, and that the said Walter did enfeof the tenant with warranty, judgment, &c. and there it is objected, that in the manner as one shall vouch, he ought to rebut, but you cannot vouch us, (*quasi diceret*, that he should not vouch one only, because the warranty descends on all, and in the like manner, that he should not rebut only against one, but it ought to be for a third part, because the demandant is not sole heir to the warranty). To which Hervy, C. J. answered, you are three coheirs, and the tenant may bar you all, *ergo*, one alone; and he shews the deed with warranty of Walter, whose heirs you are, which you do not deny; wherefore, by judgment of the court, you shall take nothing, &c. And therewith agrees 4 H. 7. 18b. where it is held, that if three (b) coparceners alien in fee with warranty, every warranty shall be collateral to the other, and yet the warranty of her who dies first, descends on both the others. The case in 6 Ed. 3. 50 a. b. was in effect, that *A. seised of three acres made a feoffment of one to B. with warranty, and died seised of the other two, having issue two daughters, who made partition, and each had one acre, the wife of A. purchased the part of one coparcener, and afterwards brought a writ of dower against B. who vouched the two daughters and heirs of A. The one (who had enfeofed the demandant of her part) entered into the warranty as one

(a) Co. Lit.
373 b.

(b) Fitz. Gar-
ranty 6.
Br. Garranty
56.

[*52 a.]

When two heirs
are vouched,
and the one
has nothing,
the other who
has, shall
render the
whole in value,
upon him alone.

although the warranty did not descend upon him alone.

“ that does not vouch all that are bound ;
“ —why should not one that is rebutted
“ have the like advantage ? There is a re-
“ solution quoted in Syme's case, out of the
“ Year Book, 5 Edw. 2. Fitz. tit ‘Gar-
“ ranty,’ 78. upon which the judgment is
“ said to be founded, being, as is there
“ said, a case in point ; but I conceive not :
“ for Harvey, that gave the rule, said, ‘ *Le*
“ *tenant poit barrer vous tous, ergo un*
“ *sole.*’ In the case there were several co-
“ heirs, and if all were demandants, all
“ might have been barred ; and if one be
“ demandant, there is no question but she
“ may be rebutted for her part. But Syme's
“ case is quite otherwise : for there one
“ person is coheir to the garranty, that is
“ not heir to any part of the land. In the
“ Year Book, 6 Edw. 3. pl. 50. there is a
“ case resolved upon the ground and reason
“ of the 45 Edw. 3.” For these reasons, he
said, he could not rely upon Syme's case.

By stat. 4 Ann c. 16. s. 21. all war-
ranties which shall be made after the first
day of Trinity Term, 1705, by any tenant
for life, if any lands, tenements, heredita-
ments, the same descending or coming to
any person in reversion or remainder, shall
be void and of no effect ; and likewise all

collateral warranties which shall be made
after the said Trinity Term, of any lands,
tenements, and hereditaments, by any an-
cestor who has no estate of inheritance in
possession in the same, shall be void against
his heir. “ It is a common mistake that all
“ collateral warranties are taken away by
“ the stat. 4 & 5 Ann. c. 16. whereas that
“ statute only makes void all warranties
“ by tenant for life, and all collateral war-
“ ranties made by any ancestor not having
“ an estate of inheritance in possession. So
“ that if A. be tenant in tail, remainder to
“ B. his next brother, (which is a very
“ common case arising almost on every
“ marriage settlement) and A. being in pos-
“ session makes a feoffment, or levies a
“ fine, with warranty from him and his
“ heirs, and dies without issue, this is a
“ collateral warranty, (for B.'s title is by
“ way of remainder, to which his elder
“ brother is collateral,) which shall bar B.
“ notwithstanding the statute, though no
“ assets descend. *Et sic de similibus.*” Ro-
binson on Gavelkind, 166. Vid. n. 2. Co.
Litt. 373 b. and vid. fully as to Warranties,
Shep. Touch. 181. Bac. Ab. Warranty, Com.
Dig. Garranty, Vin. Abr. Voucher, Sull.
Lectures, 120. 1 Wood, 335.

who had nothing by descent, the other pleaded all the said special matter, pretending, that forasmuch as the demandant had purchased the part of one, that she should not recover the whole in value against the other, but for a moiety, because the warranty did descend on both: but it was adjudged, that she should recover the whole value against her who had by descent, for when two heirs are vouched, and the one hath nothing, the other who hath, shall render the whole in value, and yet the warranty did not descend upon him alone. And it was lawful for the woman demandant to purchase the part of one, and therefore it shall not prejudice her. *Vide* (a) 11 H. 4. 20 a. b. 41 Ed. 3. 3. (b) 10 H. 7. 13. And it was said, that the book in (c) 45 Ed. 3. 23 a. b. doth not warrant any such opinion as hath been collected, for the principal case in the book at large (which is the fountain itself) is, that in a *Præcipe quod reddat* the tenant did vouch two as heirs, and said, that one was within age, and prayed that the parol might demur; the demandant said, that he was of full age, and prayed that he might be inspected in Court; upon which process was awarded until *sequatur sub suo periculo*, at which day he came not, nor no writ was returned, and the demandant prayed judgment for the moiety, because one of them who was vouched made default, and prayed *Summons ad war'* against the other; to which the demandant said, that *Summons ad war'* he could not have, because he who is vouched is demandant: to which the tenant said, that the ancestor of those who are vouched by deed which here is, did enfeoff one R. with warranty, whose estate we have, judgment if against the deed; with averment that he had assets by descent. To which the demandant said, that he had nothing by descent. And the Court gave judgment for one moiety in respect of the default of one of the vouchers, which the tenant had lost by his voucher, for which moiety he could plead nothing; and for the other moiety, although he had vouched the demandant by a strange name, and so in a manner pleaded in chief, yet forasmuch as the demandant had told him of this voucher as to him, because he is demandant himself, he might plead the warranty and assets in bar for the other moiety: upon which plea no judgment is given in the book, and therefore the Court regarded not the said collection or inference of the Lord (d) Brook, forasmuch as the book is adjudged on another point, *scil.* on default of one of the vouchers; but it was affirmed *per totam curiam*, that in the said case of warranty and assets, the lineal warranty is as entire as the collateral warranty: but inasmuch as the (e) lineal warranty is not a bar to the issue in tail without assets, and assets are to be adjudged according to the value, which may be more or less; for this reason the lineal warranty ought to follow the assets, because without assets the (lineal) warranty is no bar. As if warranty and assets be pleaded in a *Formedon* brought of four acres, each of the yearly value of twelve pence, and issue is taken on the assets, and it is found that but one acre of the value of twelve pence descends, it is

(a) Br. Garran-
ty 21. Br.
Recovery in
Value 38.

(b) Br. Garran-
ty 77.
(c) Antea 51 b.
Fitz. Vouch. 73.
Br. Garran-
ty 14.

(d) Br. Garran-
ty 14.
Antea 51 b.
[* 52 b.]
Postea 52 b.
Lineal war-
ranty is not a
bar to the issue
in tail without
assets; the li-
neal warranty
ought therefore
to follow the
assets.
(e) Co. Lit.
374 b.

no bar but for one acre, as it is held in 40 E. 3. 15 a. (a) 21 E. 3. 9 b. against the book in 21 Ed. 3. (28.) 38 b. But otherwise it is in debt or annuity brought against the heir, because lands of their nature are divisible, and the demandant in *Formedon* may recover part, and be barred of the residue; but debt and annuity in such case are entire, and not divisible, as it is said in 5 R. 2. Annuity 21. *Annua nec debitum* (b) *judez non separat ipsum*. And the opinion of the Lord Brook, (c) although it was not well collected out of the book, was affirmed for good law, if the just assets of the land in demand, and no more descends on the demandant and the other daughter; for then the demandant ought to recover the moiety, because she hath no assets but as to one moiety, and the lineal warranty only is no bar. But if the moiety of the land, which descends on the demandant, be of equal value to the land in demand, she shall be barred of the whole; for a lineal warranty, when assets to the value of the land in demand descend, is as entire and full a bar as to the demandant as a collateral warranty, descend the warranty in the one case or in the other on the demandant only, or on her and any other. And the statute of Gloucester, cap. 3. (d) enacts, that if the warranty of the tenant by the curtesy be pleaded, the heir of the wife shall not be barred by the deed of his father, from whom no inheritance descends, &c. And if inheritance doth descend from the part of the father, then he is barred of the value of the inheritance which descends to him: by force of which statute the collateral warranty, which without assets was a bar entirely to the whole by the common law, is now but a proportionable bar, having respect to the assets descended, and the lineal warranty and assets pleaded in *Formedon* in descender is taken within the equity of the said act; as it is resolved in 11 Ed. 2. (c) *Statham Gar.* 21 Ed. 3. 28 b. 38 Edw. 3. 23 a. b. &c. *Plowd. Com.* in *Fulmerston's* case, fol. 110 a. But where in the said *Fulmerston's* case it is said, if in the one case or the other, there be no assets descended at the time of the assise of Mortdancester, or *Formedon* brought, but (f) afterwards assets descend, and the tenant shall have a *Scire facias* in the case of warranty made by tenant by the curtesy, to have the land which was of the seisin of his mother, and not of the assets by the express purview of the said statute of Gloucester, and in the case of warranty made by tenant in tail, which is taken within the equity of the said act, the issue in tail shall have a (g) *Scire facias* to have the assets which afterwards descend, and not the land given in tail; and equity is the reason that the case taken within the equity of the former law shall not follow the purview thereof, but shall have another and divers constructions; for equity requires that uncertainty should be avoided as the author of contention, and that there should be an end of controversies, according to equity and right, the final end of all laws: and therefore the said statute of Gloucester well provided an absolute and just end in the case of tenant by the curtesy of land in fee-simple; for when the tenant in such case, after assets descended, recovers the inheritance of the mother which he hath purchased,

Debt and annuity brought against the heir are entire, and not divisible.

(a) *Plow.* 440 a. b. *Postea* 134 b. *Br. Warrantia Chartæ* 30. *In Medio.*

† 2 *Inst.* 293. (b) *Hetl.* 53. *Lit. Rep.* 61. *Co. Lit.* 150 a.

A lineal warranty where assets to the value of the land in demand descend is as entire and full a bar as to the demandant, as a collateral warranty.

(c) *Antea* 51 b. 53 a.

Br. Garranty 14. (d) *Co. Lit.* 365 a. b. 366 a.

2 *Inst.* 293, 294. *Plowd.* 110 a. 21 H. 7. 11 a. *Wing. Max.* 23.

(e) 11 Ed. 2. *Statham Garranty* 24.

21 E. 3. 28 b. 29 a.

(f) *Co. Lit.* 366 a. *Plowd.* 110 a.

[* 53 a.]

(g) *Co. Lit.* 366 a. *Plowd.* 110 a. 2 *Inst.* 293.

†2 Inst. 293.
Plowd. 110 a.
Co. Lit. 366 a.
393 b.

(a) 10 Co. 25 b.
Co. Lit. 70 b.
127 b.

(b) Br. *Scire facias* 29. 17.
Br. Assets per Descent 32.
Br. Discontinuance de Poss. 30.

To take advantage of the assets which descend afterwards, the tenant ought to plead the warranty, and acknowledge the demandant's title, and pray that the advantage of the statute, when assets descend, be saved to him, &c.

(c) Statham Formedon 2.
Br. Assets per Descent 17.

(d) 2 Inst. 293, 294.

[* 53 b.]

(e) Co. Lit. 366 a. Cr. Car. 373. 2 Inst. 293.

(f) 4 Leon. 136. Noy 149.

(g) Cr. Car. 373. Co. Lit. 366 a. 2 Inst. 293, 294.

(A) Plowd. 110 a. 2 Inst. 294.
Co. Lit. 366 a.
365 b.

it makes an end of that controversy, so that the demandant or his heirs shall be by force of the act barred for ever to claim the land. †But if in the said case of *Formedon*, the tenant, after assets descend, shall have a *Scire facias* for the land intailed, then if the assets shall be aliened, the issues inheritable to the estate-tail may, by writ of *Formedon* in descender, recover the land in tail, which will be cause of new suit and contention, and will not answer the final intention of the purview of the said act; and therefore, according to the rule of wisdom (a) *Sapiens incipit a fine*, to make a perpetual bar as well in that case as in the other, it was adjudged reasonable and consonant to the final intent of the makers of the said act, that in that case of an estate-tail the tenant should have a *Scire facias*, to have the assets which descend to the issue in tail in fee-simple, which as to them shall be a perpetual bar against him and his heirs, which in just and proportionable equity agrees with the other case. *Vide* (b) 43 E. 3. 26 a. and (c) 40 E. 3. 39, &c. where it is held, that if warranty and assets be pleaded against the issue in tail, and if the demandant hath nothing by descent, and land descend to the issue afterwards, he shall have a *Scire facias* to have the value. But it is in none of the said books expressed, how the tenant shall demean himself in pleading to take advantage of the assets which descend afterwards. And therefore if in a (d) *Mordancester*, *Cosinage*, *Aiel*, *Besaiel*, &c. the tenant pleads the warranty of the tenant by the curtesy with assets; or in a *Formedon* the tenant pleads a lineal warranty and assets, and the demandant takes issue on the assets, and it is found by inquest that nothing descends whereby the demandant recovers, and after that recovery assets descend, the tenant shall never have a (e) *Scire facias* to take the benefit of the said act, for divers reasons. 1. Because the said trial is (f) as peremptory to him as if assets had been found by the inquest it had been to the demandant. 2. There is no record on which he can ground his *Scire facias*. 3. By the putting himself upon the trial of assets he hath waved the advantage which he might have taken upon the said act. 4. He who will take benefit of that act, ought not to begin with a falsity. But if the tenant will take benefit of the said act, he ought to plead the warranty and acknowledge the demandant's title, and pray that the advantage of the statute when assets shall descend be saved to him, &c. and upon that record, when assets descend he shall have (g) *Scire facias*; and that stands with the letter and intention of the said act: for the words are "by writ of (h) judgment which shall issue out of the rolls of the Justices." So that the *Scire facias* ought to be grounded on the rolls of the Justices. Also the statute goes farther. To resummon the warranty as it hath been done in other cases, *scil.* where the warrantee (or vouchee) comes into Court and saith, that nothing is descended to him from him by whose deed he is vouched, &c. which if the tenant doth not deny, &c. he shall have the benefit of the assets which shall afterwards descend to the vouchee: but if he takes issue that assets descend to him, and by inquest it be found against

him, that nothing descend, he shall never have any benefit of the assets which shall afterwards descend to the vouchee. But it was said, if assets be found by inquest but not to the (a) value, there the demandant shall have benefit of the assets which afterwards descend, because the vouchee's plea is false; and, on the other part, it would be hard to drive the demandant, who is a stranger, to know the precise value of the land which the vouchee hath by descent; but he may well take knowledge whether he hath any land by descent from the same ancestor or not. And in this case divers good (b) differences were observed, which do appear in our books. 1. Between a collateral warranty and an estoppel; for a collateral warranty binds the right of him who claims not by him who makes the warranty, but an estoppel shall bind only the heir who claims the right of him to whom the estoppel was: as at the common law before the said statute of Gloucester, cap. 3. If the husband had aliened the land which he had in the right of his wife, with warranty, and the husband and wife died, in that case the right descends from the wife, and yet that warranty, being collateral to the title of the land, should bar the wife's heir: but it is adjudged in 18 Edw. 3. 9 b. that where (c) lands were conveyed to the husband and wife, and to the heirs of the husband, and the husband gave them in tail and the husband died, the wife should recover the land against the donee by writ of *Cui in vita*, supposing that she had the lands to her and her heirs in fee: the wife after the recovery enfeoffed another and died; the donee in tail died without issue, and the issue of the said husband and wife brought a *Formedon* in the reverter against the feoffee of the wife: and although the issue was heir to the wife who was estopped by the said recovery in the *Cui in vita*, to say that she had a lesser estate than a fee-simple, yet the issue who claims the reversion of the land as heir to the husband shall not be (d) bound by that estoppel made by the wife, although he be heir to her also; for then, by her own act, the wife who had but an estate for life might bar the heir who had right, and who claimed as heir to his father. But a collateral warranty cannot take effect without the act of God, *scil.* the death of him who makes it, and in the mean time the estate to which, &c. may be debated. But in this point the warranty and the estoppel * concur, both which shall descend on the general (e) heir, to him who made the warranty or estoppel, and not on the particular heir, as on the younger son, and not on the sister of the half blood, &c. as appears in (f) 35 H. 6. 34. and as the heir who doth not claim the land as heir to him who made the estoppel, as hath been said, shall not be bound thereby for his disadvantage; so in the same case he shall not be capable of advantage, unless it be in special cases; and therefore it is adjudged in 38 Ed. 3. 10 a. b. that if a woman (g) mesne binds herself to acquittal to the tenant and his heirs, and after the woman takes a husband, and the tenant by his deed grants to the husband, that he nor his heirs shall be bound to the said acquittal, and afterwards the husband and wife have issue and die, this issue, although

(a) Co. Lit. 366 a.

Differences between a collateral warranty and an estoppel.

(b) Co. Lit. 365 b.

(c) Co. Lit. 365 b. Fitz. Estop. 219.

(d) 1 Jones 459. Cr. Car. 525. Co. Lit. 365 b.

[* 54 a.]
 (e) Co. Lit. 12 a. 337 b.
 Hob. 31.
 (f) Hob. 31.
 Br. Estoppel 23.
 9 Co. 9 a.
 Plow. 136 a. b.
 35 H. 6. 33 b.
 34 a.
 Fitz. Estop. 57.
 (g) Co. Lit. 13 a. b.
 Fitz. Mesne 24.
 Vct. Nat. Br.

(a) Co. Lit. 8 a.
3 Co. 89 a.

Difference between advantages in gross, and those which by the grant are made appurtenant or incident to another thing.—If a man be seised in right of his wife of a house, and a grant be made to him and his heirs to have estovers to be burnt in the house, the estovers shall descend to the issue of the husband and wife.—One seised of a house *ex parte materna* has a grant of housebote to be burnt in the house, it shall go with the house to the heir *ex parte materna*.—Same law in the case of a rent-seck, and a grant to distrain.

(b) 38 E. 3. 10
a. b. *supra*.

[* 54 b.]

A man seised of land *ex parte materna*, makes a gift in tail rendering rent, this new rent goes with the reversion to the heir *ex parte materna*.

Difference between estoppels which stand upon recompence, and those which accrue by admittance, &c. of record.

(c) Co. Lit. 12 b. 13 a.

(d) Co. Lit. 12 b. Br. Tenure 86.

(e) Co. Lit. 12 b. 1 Co. 100 b.

Br. Dis-
cent 11. (f) 2 Bulstr. 43.

he be heir to the husband, yet because the line of acquittal descends to him as heir to his mother, he shall not be capable of the said advantage of the said discharge, *quia (a) hæres dicitur ab hæreditate, et non hæreditas ab hærede*. But therein also there is a difference between advantages in gross, as in the case of (b) 38 E. 3. and advantages, which by the grant are made appurtenant or incident to another thing: as if a man be seised of a house in the right of his wife, and another grants to the husband and his heirs, to have sufficient estovers to burn in the same house, in that case the estovers are appurtenant to the house, and shall descend to the issue of the husband and wife. So if one have a house of the part of his mother, and one grants to him, that he and his heirs shall have competent housebote to be burnt in the same house, this is appurtenant to the house; and although it be a new purchase, yet it shall go with the house to the heir of the part of the mother. The same law if a man hath a (c) rent-seck by descent of the part of his mother, and the terre-tenant grants to him and his heirs that they shall distrain for the rent, &c. this is as appurtenant to the rent, and shall go with the rent to the heir of the part of the mother; and so it was held in (d) 5 E. 2. Avowry 207, in Jordan's case, that where Alice was seised of a manor in fee, and took to husband one Jordan, and had issue Sibil; and afterwards Jordan and his wife died, and Sibil was seised of the manor, as heir of the part of her mother, who before the statute of *Quia emptores terrarum*, did enfeof P. of parcel of the manor by four shillings rent, and afterwards Sibil died without issue: and there the question was, who should have this seignior and rent of four shillings newly created, whether the heir of the part of the mother, or the heir of the part of Jordan, the father; and there Beresford, Chief Justice of the Bench, said, when Sibil enfeofed P. of parcel of the manor which descended to her from Alice, these services were then appurtenant to the remainder of the manor, wherefore the death of Sibil, without heir of her body, could not defeat that *appendance. So it is held in 7 H. 6. 4 b. that if a man be seised of land of the part of his (e) mother, and maketh a gift in tail rendering rent, this new rent, which is incident to the reversion, shall go with the reversion to the heir of the part of the mother. And it is to be known, that there is a (f) difference between estoppels or conclusions which stand upon recompence, and other estoppels which stand upon affirmation or admittance of any matter, by matter of record: as if an abator marries with the right heir, and has issue by her, and the abator makes a lease for life rendering rent, and he and his wife die, in this case the issue has the mere right of the part of his mother; and yet if he accepts the rent, and makes acquittance, it shall estop him and his heirs to avoid the said lease, in respect of the acceptance of the recompence;

and therewith agrees 39 H. 6. 27. *Vide* (21) 28 H. 6. 24. But an estoppel which accrues by admittance, &c. of record, shall not conclude the heir who claims not the right by the same ancestor, as it is adjudged in (a) 18 E. 3. aforesaid.

(a) 18 E. 3. 9 b.
Antea 55 b.

Co. Lit. 365 b. Fitz. Estop. 219.

ROGER EARL OF RUTLAND'S CASE. [55 a.]

Mich 6 Jacobi I.

If the King grants the herbage and pannage of the park of C., to A. for life, and afterwards the King reciting the grant to A., and that he is living, grants the herbage and pannage of the said park to B. for his life, without shewing when it shall begin, such grant to B. is good. And resolved,—1st. The King has divers manners of inheritance, some to give only in possession and not in reversion, some to grant as well in reversion as possession, but which he cannot use or exercise himself, others as well to use and enjoy himself as to grant to another, the possession, remainder or reversion. 2. The King was not deceived in his grant.

Earl of
RUTLAND
v.
Earl of
SHREWSBURY.
Pt. VIII.—55a.

When the King's charter may be taken to two intents good, in many cases it shall be taken to such intent as is most beneficial for the King: but if it may be taken to one intent good, and to another intent void, it shall be taken in such manner as that the grant may take effect.—3rd. There is no uncertainty in the grant; it shall take effect in possession when the first grant shall be ended or determined, whether it be by death, surrender, or forfeiture.

When one is officer for life, if the King without reciting it grants the office to another for life, the second grant is void for want of a recital.

In assise of novel disseisin for disseising the plaintiff from the office of keeper of the park called C. park, the plaint set out the plaintiff's title that the Queen was seised of the said park in fee, and granted the office of keeper of her park called C. (without saying said park) to A. &c. exception that it shall be intended another park not allowed. S. C. Jenk. Cent. 183. S. C. on Error. [1 Bulstr. 4. 2 Brownl. 229.]

ROGER Earl of Rutland brought an assise of novel disseisin against Gilbert, Earl of Shrewsbury, and others, and complained he was disseised of his freehold in Clipson, in the county of Nottingham, and made his plaint to be disseised *de* (a) *officio custodis parci, vocat' Clipson Park, ac de pannagio et herbagio præd' parci de Clipson præd' cum pertinen' et pro* (a) Ante 47 a.

titulo liberi tenementi de officio præd' ac de pannagio et herbagio præd', the plaintiff said, that Queen Elizabeth was seised of the said park in fee, in the right of her crown, and 19th March, anno 10 by her letters patent granted to Thomas Markham, ar' *officium custodis parci sui, vocal' Clipson Park*, (without saying *prædict'*) *ac eundem Tho. Markham præd' parci sui vocal' Clipson Park, fecit, ordinavit, et constituit per easdem literas patentes*, to have and to hold to him for term of his life, with all fees due and accustomed; and further granted by the said letters patent, to the said Thomas Markham, *pannagium et herbagium prædict' parci sui de Clipson*, to have and to hold the said pannage and herbage to the said Thomas Markham for term of his life. And afterwards Queen Elizabeth, so seised of the said park as is aforesaid, died thereof seised. After whose death the said park descended to the King that now is; *ac præd' Tho. Markham de præd' officio et pannagio et herbagio præd' in forma præd' seisit', existen', idem dominus Rex 9 die Junii an' regni sui primo, per literas suas patentes, &c. recitando præd' statum præd' Tho. Markham deet in præmiss' præd' sic ut præfert, sibi concessis, concessit eidem com' Rutland' præd' offic' custodis præd' parci voc' Clipson Park* to have and to hold to him for his life, *quam cito officium præd' per mortem, sursum redditionem, forisfacturam vel aliquo alio modo quocunque vacaverit*, with all fees, &c. and farther granted by the same letters patent, the said herbage and pannage to the said Earl of Rutland, for term of his life (without shewing when the estate of the herbage and pannage^(a) should begin) **adeo plene et integre prout præd' Tho. Markham, &c. habuit, tenuit, seu gavisus fuit, &c.* And afterwards the said Thomas Markham, 9 Martii, anno quarto regis nunc died, after whose death the plaintiff was seised of the said office, and of the herbage and pannage, till disseised by the defendants. To which the defendants pleaded the general issue, *nul tort nul disseisin*; and as to the office, the recognitors of the assise found for the plaintiff; and as to the herbage and pannage they found the letters patent at large *ut supra*; and if the herbage and pannage passed by the said letters patent to the plaintiff, they found for the plaintiff, &c. And the matter in law was such, the King grants the herbage and pannage of the park of C. to Markham for life, and afterwards the King reciting the grant to Markham and that he is living, grants the herbage and pannage of the said park to R. Earl of Rutland for his life, without shewing when it shall^(b) begin. And if the grant of the herbage and pannage to R. Earl of Rutland were good or not, was the question. And it was objected that the said grant to R. Earl of Rutland was void for the uncertainty of the beginning thereof, for it cannot begin presently, because Markham had it then for his life, and it doth not appear whether the King intended it should begin after the death of Markham, or forfeiture, or surrender, or when it should begin, and for such uncertainty the grant in the King's case shall be void. And the cases in (c) 3 H. 7. *casu ult. (d)*

(a) 2 Brown.
[* 55 b.]
229, 234, 242.
Jenk. Cent.
283. 1 Brownl.
27.

(b) 2 Brownl.
229, 234, 242.
Jenk. Cent.
283. 1 Brownl.
27. Post. 56 b.

(c) Br. Patent
52.
Fitz. Grant 35.

(d) Br. Patent 54.

6 H. 7. 14 a. and (a) 8 H. 7. 12 b. were cited, that the King cannot grant the (b) reversion of an office which one hath for the term of his life; but may recite that such a one, *habeat et teneat tale officium pro termino vite sue*, and grant *offic' præd' tali, habend' post mortem, &c.* but if the King grants the office to another (without such special recital) for life, the second grant is void (A). *Vide* 11 E. 4. 1 b. 32 E. 3. Avowry 112. But it was resolved by Coke, Chief Justice, Walmsley, Warburton, Daniel, and Foster, Justices, that the said grant of the herbage and pannage was good; and in this case divers points were resolved. 1. That the King has divers manners of inheritance. 1. Some to give only in possession, and not in reversion, as a corody in a house of religion, or to present one to a church of his patronage, as it is agreed in 39 Hen. 6. 48. for in these cases, and other like, the King has but a presentation or commendation of a person, when the corody or church is void, and not before, and cannot give the corody or present to the church in reversion. 2. The King has some inheritance which the King may grant as well in reversion as in possession: but he cannot use or exercise them himself, as (c) offices. *Vide* 1 H. 7. 29 b. a man grants an office of servitude as forestership, &c. *cum omnibus terris eidem officio pertinentibus*, the remainder to the King in fee; in this case although the King cannot be officer to any one, yet the King is capable thereof, to grant the office to another which he himself cannot use or exercise, also such office may be forfeited to the King, and the King shall have an inheritance in it to *give, &c. *Vide* (d) 3. 6. (e) and (f) 8 H. 7. before. 3. Other inheritances the King has, as well to use and enjoy himself, as to grant to another, *scil.* the possession, remainder, or reversion; as houses, lands, rents, commons, herbage, and pannage and the like, which are parcels of his inheritance. 2. It was resolved, that the King was not (g) deceived in his grant, for he has recited the estate of Markham which he had in the herbage and pannage, for term of his life, and that Markham was then living, so that the King well knew that he could not grant that in possession, which another then held for his life, but it ought to take effect as it might by law. And the case of the Lord Chandos, in the Sixth Part of my Reports, was resolved to be a stronger case; for there the King mistook the law, thinking, that by the surrender of the letters patent, the estate tail was extinct, and that he thereupon was seised in

(a) Br. Patent 57. Fitz. Grant 42.

The grant of the herbage and pannage is good. Resolved, 1. The King has divers manners of inheritance, some to give only in possession and not in reversion; some to grant as well in reversion as in possession, but which he cannot use or exercise himself, others as well to use and enjoy himself as to grant to another, the possession, remainder, or reversion.

[* 56 a.]

2. The King was not deceived in his grant.

(b) Post. 57 a. 10 Co. 61 a. Dyer 80. pl. 58. 11 Co. 4 a. March. Rep. 41. Cr. Car. 279. Dyer 259. pl. 18. 2 Roll. 154. Co. Lit. 3 b. Hob. 150, 151.

4 Inst. 202. 11 E. 4. 1 b. Cr. Jac. 17, 18. (c) 10 Co. 61 a. Co. Lit. 3 b. Bridg. 30. 1 H. 7. 29 b. Br. Prærog. 125. Br. Grant 83. Fitz. Grant 32. Plow. 381. 379 b. 10 H. 7. 18 b. (d) 3 H. 7. casu ultim. Br. Patent 52. Fitz. Grant 35. Ante 55 b. (e) 6 H. 7. 14 a. Br. Patents 54. Ante 55 b. (f) 8 H. 7. 12. Br. Patents 57. Fitz. Grant. 42. (g) 1 Co. 46 a. 51 a. 52 b. Moor 45, 164. 9 H. 6. 28 b. Lane 110. 2 Co. 33 b. 5 Co. 94 a. 6 Co. 29 b. 55 b. 7 Co. 12 a. 10 Co. 112 b. 11 Co. 4 b. 90 a. Hob. 223, 229. Cro. Car. 198. Yelv. 48. 2 Roll. 188. Dyer 339. pl. 47. 352. pl. 26. Co. Ent. 384 a. 41 Ass. 19. Br. Patent 38. Br. Alienat. 21. Plow. 132 a. Mod. Rep. 196. Kelw. 8 b. 12 b.

(A) Vid. upon the construction of the King's grant, and as to what property may be granted by the Crown, note (a. 2.) *Allon Woods case*, Vol. I. p. 101. and vid. the note to Auditor *Curle's case*, 11 Rep. 4 a.

When the King's charter may be taken to two intents good, in many cases it shall be taken to such intent as is most beneficial for the King: but if it may be taken to one intent good, and to another intent void, it shall be taken in such manner, as that the grant may take effect.

[*56 b.]

There is no uncertainty in the grant; it shall take effect in possession when the first grant shall be ended or determined, whether it be by death, surrender, or forfeiture.

fee, and therefore he granted the manor in possession, and yet the (a) reversion did pass without any word of reversion, for the grant ought to take effect, as by law it may; which case of the Lord Chandos was affirmed to be good law, *per totam curiam*. But in the case at bar the King mistook nothing, nor took upon him to grant *that* which he could not grant, nor was deceived in any part of his grant: and when the King's charter may be taken (b) to two intents good, in many cases it shall be taken to such intent as is most beneficial for the King; but if it may be taken to one intent good, and to another intent void, then for the King's honour, and for the benefit of the subject, it shall be taken in such manner as the King's grant may take effect, for it was not the King's intent to make a void grant. And therewith agree the reason and rule of the book of (c) 21 E. 4. 44 b. where King Richard Second, granted to the abbot of Waltham, that he and his successors should not be *collectores decimarum*, &c. *Concess. Regi per clerum Angliæ nec alicujus inde parcelle* in that case, if the grant be taken literally *per clerum Angliæ*, that is, *per totum clerum Angliæ*, the grant is void, for all the clergy of England never met at one convocation, but every province has a several convocation, and therefore the King's grant shall not be taken in such sense, for then the grant will be void: but it shall be taken in such sense as it may stand with law, and that is by the clergy, as the clergy can grant tenths, and that is in their several provinces; and that is also a stronger case than the case at bar, for here the words of the grant may well stand with the King's meaning, *scil.* to grant the herbage and pannage in reversion, for in possession he cannot grant it; but in the case of 21 Ed. 4. the words of the grant, and the King's intent varying, the letter gives place to the King's intention. And the case of Sir (d) John Molyns, in the Sixth Part of my *Reports, was cited, in which case also the words were against the King's intent, for at the time of the grant there was not any Chief Lord, for then all seignories were extinguished; but yet for (e) the King's honour and to make his grant take effect, it was adjudged, that the tenure was revived. 3. It was resolved, that there was not any uncertainty in the said grant of the herbage and pannage to the plaintiff, when it should take effect in possession; for it shall (f) begin when the first grant shall be ended or determined: and although it may determine by sundry ways, *scil.* death, surrender, or forfeiture, yet it can determine but once, and which of them first happens, then the grant to the plain-

(a) 6 Co. 55 b. 56 a. 66 b. Co. Lit. 324 b. 10 Co. 107 a. b. Cr. Car. 400. 5 Co. 124 b. 4 Co. 36 a. Dyer 125. pl. 45, 233. pl. 10, 11. Plow. 155 a. 159 a. 30 E. 1. Grant. 86. 7 E. 4. 20. Fitz. Feof. 22. Fitz. Grant. 97. 35 H. 8. Br. Grant. 50. 2 Roll. Rep. 180, 277, 278. Hob. 224. Lane 3, 7. Br. N. C. 267. Lit. Rep. 18. 2 Brownl. 234. (b) 1 Co. 45 a. 8 Co. 167 a. 11 Co. 11 a. b. 1 Bulstr. 6. 10 Co. 67 b. Kelw. 175 a. 198 a. 2 Siderf. 141. 3 Léon. 243. 2 Roll. 3, 4 a. b. 200. (c) 3 Keb. 234. Dyer 269. pl. 19. Br. Patent 71, 90. 1 Co. 45 a. Br. Exemption 9. 8 Co. 167 a. 11 Co. 11 b. Plow. 32 a. 126 a. 143 b. 331 b. Fitz. Grant. 29. Br. Exposit. 28. Moor 165. Hard. 500. 2 Roll. Rep. 275. 2 Siderf. 82. (d) 6 Co. 6 a. Postea 77 a. (e) 6 Co. 6 a. (f) Antea 55 a. b. 2 Brownl. 229, 230, 231, 242. Jenk. Cent. 283. 1 Brownl. 47.

tiff shall begin : so that there is not any uncertainty in this grant, for it is implied in law that the second grant shall begin after the determination of the first grant, *et (a) expressio eorum quæ tacite insunt nihil operatur*. And therefore, if the King reciting that such a one holds the manor of D. for his life, grants the said manor to B. for his life ; in this case the law implies, that the second grant shall take effect after the determination of the first grant ; the same law of a gift in tail, or a grant in fee. And it was said by Coke, *(b)* Chief Justice, and affirmed by the other Justices, that of late times such nice and strict construction hath been strained by some of letters patent, to subvert the force and effect of them ; that many good letters patent are drawn in question, which is to the King's dishonour, the disherison of the subject, and against the true reason and ancient rule of the law, as appears in all our books, *et talis certitudo certitudinem confundit*, such nice and captious pretence of certainty, confounds true and legal certainty, *et (c) maledicta expositio est quæ corrumpit et confundit textum*. And it was said, that it was resolved in Auditor King's case, that where Queen Elizabeth granted a manor to B. *(d)* and his heirs, (in the premises of the letters patent) to have and to hold the said manor to B. and his assigns (leaving out heirs in the *Habendum*) that the fee of the manor did pass by the premises of the letters patent, and the *habendum* was void ; for the premises were certain enough to pass the fee-simple, and the omission of heirs in the *habendum* should not overthrow that which was certain in the premises. Which case was affirmed for good law, *per totam curiam*, for the Queen's intent appeared to pass the fee simple by the premises, and her grant ought to be construed *(e) secundum intentionem Regis, et non deceptionem Regis* ; and when a literal and strict construction is made to make his grant void, *contra intentionem Regis*, it sounds in deceit of the King, and is a great indignity to him ; *propter apices juris*, to make his charter under the great seal, of things which he may lawfully grant, void and of none effect, *quia (f) apices juris non sunt jura*.

*And as to the case of office, it was said, that the said books which were cited, prove that the King cannot grant *(g) reversionem officii*, for he has no reversion, but an inheritance grantable in reversion. Also when one is officer for life, if the King, without *(h)* reciting it, grants the office to another for life, the second grant is void for want of a recital : but no book saith, that if the King recites the first grant of the office, &c. and that the officer is living, and grants the office to another for life, that this last grant shall be void for want of certainty of the beginning ; for the law, upon the matter which appeareth, shall limit the beginning, to the end the King's grant shall not be void. And exception was taken to the plaint, forasmuch as

(a) 10 Co. 39 a.
Hob. 170. 1
Mod. Rep. 190.
Lit. Rep. 111.
Hard. 92. 1
Roll. Rep. 310.
2 Roll. Rep.
393. Palm. 433,
437. Wing.
Max. 235. 4
Co. 73 b. 5 Co.
11 a. 8 Co. 145
a. 11 Co. 60 a.
Co. Lit. 191 a.
205 a. 2 Inst.
365. 2 Sand.
351. 2 Bulst.
131. Latch. 25.
(b) Wing. Max.
27.
(c) Wing. Max.
26. 2 Co. 24 a.
Post. 154 b.
3 Bulst. 105,
107, 108. 1
Roll. Rep. 319.
(d) Jenk. Cent.
283. 2 Roll.
Rep. 361. O.
Bridgm. 210.

(e) 3 Bulst.
3, 14. 1 Co. 49
a. 1 H. 7. 13 a.

[* 57 a.]
The King cannot grant reversionem officii. When one is officer for life, if the King, without reciting it, grants the office to another for life, the second grant is void for want of a recital.

(f) 2 Roll. Rep. 361. 6 Co. 65 a. Co. Lit. 283 a. b. 304 b. Noy. 30.
(g) Ante 55 b. 10 Co. 61 a. Dyer 80. pl. 58, 259. pl. 18. 11 Co. 4 a. March. Rep. 41. Cr. Car. 279. 2 Roll. 154. Co. Lit. 3 b. Hob. 150, 151. 4 Inst. 202. 11 E. 4. 1 b. 3 H. 7. casu ultimo. 6 H. 7. 14 a. 8 H. 7. 12 b. Br. Pat. 52, 54, 57. Fitz. Grant 35, 42. Cr. Jac. 17, 18. (A) 2 Roll. 190.

Exception taken to the plaintiff and over-ruled.

(a) Cro. El. 97.
2 Ventris 197.
Cr. Jac. 289.
Palm. 499.

(b) 5 Co. 121 a.
and note.
2 Bulst. 77, 78.
Co. Lit. 303 a.

(c) Cr. Jac. 17,
18.

+ 10 Co. 105 a.
(d) 2 Inst. 24,
25.
(e) 1 Bulst. 45.
2 Brownl. 229,
230.

[* 57 b.]

in alleging the grant made to the said Tho. Markham, the plaintiff is, that Queen Elizabeth did grant *officium (custod.) parci sui vocati Clipson Park* (without saying (a) *prædict'*) and therefore it was objected, it shall be intended another park. But it was resolved, that upon consideration of all the parts of the plaintiff, it appears, that it was the same park: for the plaintiff begins his plaintiff, *pro titulo liberi tenementi de officio prædicto*; also he shews, that Queen Elizabeth was seised, &c. *de parco prædicto*, and so seised, granted *officium parci sui de Clipson*, which ought to be intended the same park whereof the seisin was alleged at the time of the grant, and *eo potius* in respect of this pronoun possessory (*sui*) and in all other parts of the plaintiff (*prædict'*) is added: so that it is well said in Long's case, in the Fifth Part of my Reports, that there are three manners of (b) certainties:—1. Certainty to a common intent, and that sufficeth in bars for those who defend themselves. 2. To a certain intent in general, and that is sufficient in indictments, plaintiffs, counts, replications, &c. 3. To a certain intent to every particular intent, and that is rejected in law (b), for there it is said, *Quod talis certitudo certitudinem confundit*; and so it was adjudged in the point, in the assise brought by the Lady (c) Russel, against the Lord Admiral; and this assise being (after a general verdict for the plaintiff for part, and a special verdict for the residue,) adjourned into the Common Pleas, judgment was there given: but assises ought to be brought in + *proprio comitatu*, by the statute of Magna Charta, (d) cap. 12.

And afterwards on this judgment, a writ of (e) error was brought, and all that which was resolved by the Court of Common Pleas was affirmed for good law, by Fleming Chief Justice, Fenner, Yelverton, Williams, and Crook, Justices of the King's Bench. But for other errors not assigned nor moved in the Common Pleas, in which the Justices of the King's Bench were not unanimously agreed, the judgment was reversed. And so this case, as to the *points reported by me, was unanimously resolved by both Courts: and afterwards, on a new assise brought before Warburton and Foster, Justices of assise in the county of Derby, at the next assises, the plaintiff had a general verdict, according to the opinion of all the Justices, and judgment also at the same assises, and execution awarded, &c. *Et sic finita est ista questio*.

(b) Vid. note (a) Long's case, Vol. III. p. 247.

BEECHER'S CASE,

Mich. 6 Jacobi 1.

In the Exchequer.

To debt on bond, the defendant pleaded payment upon which the parties were at issue, but for default of a good visne, judgment was arrested; afterwards the plaintiff, per Johannem Osborne, *attornatum suum venit hic in curia et fatetur se in curia hic ulterius nolle prosegui*, upon which judgment was given that the defendant *eat sine die*, and there was no amercement on the plaintiff, and upon error brought by the plaintiff, the judgment was held to be erroneous; and resolved,—1. A *Retraxit* cannot be, unless the plaintiff or defendant be in Court in proper person. It is error to appear by attorney in those cases where the defendant or tenant cannot by the law appear by attorney: but in those cases where the defendant or tenant may appear by attorney, but upon some process by reason of some default or contempt, he ought to appear in person, appearance by attorney is not error. 2. In a *retraxit* by the plaintiff, he ought to be amerced.

BEECHER
v.
SHIRLEY.
Pt. VIII.—58 a.

In process or delay, which is for the advantage of the party, he shall not assign it for error, but the amercement is parcel of the judgment, and the judgment is not perfect without it; and the omission of the amercement is error.

In all actions *Quare vi et armis*, if judgment be given against the defendant, he shall be fined and imprisoned.

In a writ of deceit upon a real action upon a recovery by default, if it be found on examination, that the tenant was not lawfully summoned, the defendant shall be fined and imprisoned.

In an action on the case in the nature of deceit, the defendant shall be amerced.

If the defendant or tenant pleads a false deed made to him, or denies his own deed, and it be found against him, &c. he shall be fined.

If he denies his ancestor's deed, or pleads a deed to his ancestor, and it be found against him, he shall be amerced.

If he denies a recovery, or other record to which he is party, he shall not be fined.

If the defendant in a replevin claims property falsely, and it is so found in *proprietas probanda*, he shall be fined and imprisoned.

In appeals of death, robbery, &c. if the plaintiff be barred, or nonsuit, or if the writ abate by his default, he shall be fined and imprisoned.

So also in attaint. So also if the attaint pass against the defendant if he were party to the first record, he shall be fined and imprisoned: but if he were not, as tenant by receipt or other terretenant, he shall not be fined.

Where any uses the law for double vexation, he shall be fined.

In a recaption, the plaintiff shall recover damages, and the defendant shall be fined and imprisoned for his double vexation.

For all contempts done to any court of record against the King's commands by his writ under the great seal, the offender shall be fined and imprisoned: but when the demandant or plaintiff, or the tenant or defendant, *se retraxit* or *recessit in contemptum curiæ*, there is no contempt against the King's writ. Where a thing is forbid by any statute, the offender shall be fined and imprisoned.

A court, which is not of record, cannot impose a fine, nor commit to prison.

In all writs of *Præcipe quod reddat*, *præcipe quod permittat*, et *præcipe quod faciat*, on nonsuit, bar, or writ abated for want of matter or form, the demandant shall be amerced. If there be two demandants, and the writ abate for the death of one, the other shall not be amerced. In all the said writs of *præcipe*, if judgment be given against the tenant, he shall be amerced.

In all personal actions, without force or deceit to the Court, and also in actions which comprehend force or deceit to a court of record, if the plaintiff be barred, nonsuit, or the writ abate because it is vicious in matter or form, he shall be amerced only; if the writ abate by the death of one plaintiff, or one plaintiff be nonsuit, he who survives or appears, shall not be amerced.

If one demandant in a real action, or one plaintiff in a personal action, where summons and severance lieth, be nonsuit, and the other proceeds, he who is nonsuit shall not be amerced.

In all judicial process, if the plaintiff be barred, nonsuited, or if the writ abate, he shall not be amerced.

In all actions, real or personal, if part be found for the demandant or plaintiff, and part against him, or all or part against one tenant or defendant, and nothing or but part against the other, the demandant or plaintiff shall be amerced; unless no default be in the demandant or plaintiff.

In all actions, real or personal, where there is but one tenant or defendant, he shall not be twice amerced: but where there is but one demandant or plaintiff, and divers defendants, the plaintiff may be divers times amerced.

On discontinuance, or when the Court is ousted of jurisdiction, there shall be no amercement.

In all actions, real or personal, if the tenant or defendant comes the first day, and render the thing in demand, &c. he shall not be amerced, unless the action imports force or fraud.

The King and the Queen, on account of the dignity of their persons, shall not be amerced.

Infants, on account of the imbecillity of their age, shall not be amerced.

3. Although the plaintiff in the principal case in proper person had made a *retraxit*, yet he might have a writ of error, either in the judgment, or in the proceeding. 4. The entry of the *retraxit* in the principal case was insufficient. S. C. [Cro. Jac. 211. Jenk. Cent. 283.]

Shirley, knight, who Trin. 41 Eliz. pleaded in bar, payment according to the conditions of the bonds, &c. and the parties were at issue, and found for the plaintiff: but for default of a good visne, judgment was arrested, and afterwards, *scil.* Hil. 44 Eliz. the plaintiff *per Johannem Osborne, allornatum suum, venit hic in curiâ, et fatetur se in curiâ hic ulterius nolle prosecute* (A): upon which judgment was given, that the defendant *eat sine die*, and no amercement upon the plaintiff. Upon which judgment the plaintiff brought a writ of error in the Exchequer Chamber; and upon sundry arguments by the plaintiff's and defendant's counsel, at several days, it was resolved by the Court, and the two Chief Justices, that the judgment was erroneous, for divers reasons. 1. It was resolved, that a (a) *Retraxit* cannot be, unless the plaintiff or defendant be in Court in proper person, for the entry is in divers manners, (as it appears after) as, *Quod querens in propria personâ suâ venit et dicit, quod ipse placitum suum prædict' ulterius prosecute non vult, sed abinde omnino se retraxit, &c.* or being present in Court and demanded, where the entry is (b) *a seclâ suâ prædictâ in contemptum curiæ se retraxit, etc.* or *faletur se ulterius nolle prosecute, etc.* and therewith agrees (c) 3 H. 6. 14 a. 21 E. 4. 3. 43 a. and 4 E. 3. 23 a. where the case was, that three coparceners were plaintiffs in a writ of deceit, and two of them did appear in person, and the third by attorney; and said, that they would not sue further, and could *not, because one was by attorney; wherefore they were nonsuit. *Vide lib' intrat'* 92. title Attaint, Bre' 5. and title Appeal, 56. and title Trespass. 589 a. 13, 14, 15, 16. and title Conspiracy, 125 b. 6 Ed. 3. 30 b. and 31 a. John Fremd's case, in a *Formedon*, the attorney of the tenant cannot depart in despite of the Court, but a *Grand cape* shall be awarded. And it is to be known, that at the (d) common law, when any one was, by the King's writ, commanded to appear, it was always taken that he should appear in person, and could not appear by attorney: but after he had appeared, the Courts of Chancery, King's Bench, and Common Pleas, and all other Judges who held plea by writ, might, after appearance, have admitted him by attorney: otherwise when plea was held without writ, unless the King granted a writ *De attorneyato faciendo*, and that appears by Britton, c. 126. f. 287. But *vide* the stat. of Westm. 2. (c) c. 11. and other statutes, which gave remedy in many cases: but the said case at bar is not remedied by any statute. But it was objected, that it is true that, *de rigore juris*, the plaintiff in the case at bar ought

1. A *Retraxit* cannot be unless the plaintiff or defendant be in Court in proper person.

(a) 1 Roll. 584. Co. Lit. 138 b. 139 a. Cro. Jac. 211. 3 Salk. 50. 1 Wils. 89.

(b) Co. Lit. 139 a. Postea 62 a.

(c) Fitz. Retraxit 4.

[* 58 b.]

At common law when any one was by the King's writ commanded to appear, it was always taken that he should appear in person.

(d) F.N.B. 25. C. Co. Lit. 128 a. 2 Inst. 249. 10 Co. 101 a. b. Cawly 164. 2 Inst. 377, 378. (c) W. 2. c. 10. 2 Inst. 376, 377, 387.

(A) From this entry it seems that the plaintiff entered a *nolle prosecute* rather than a *retraxit*. Formerly a *nolle prosecute* seems to have been considered as in the nature of a release, or indeed as an actual *retraxit*; and, therefore, when entered as to one defendant operated as a discharge to all, and as a bar to any new action for the same cause. But it is now held that a *nolle prosecute* may be entered against one of several

defendants before judgment obtained against the other: and that it is no bar to a fresh action for the same cause, except in those cases where from the nature of the action, judgment, and execution, against one is a satisfaction of all the damages sustained by the plaintiff. *Cooper v. Tiffin*, 3 T. R. 511. *Moke v. Ingham*, 1 Wils. 90. *Dale v. Eyre*, 1 Wils. 306. Serjt. Williams, n. 2. *Salmon v. Smith*, 1 Saund. 206.

It is error to appear by attorney in those cases, where the defendant or tenant cannot by the law appear by attorney. But in those cases where the defendant or tenant may appear by attorney, but upon some process by reason of some default or contempt, he ought to appear in person, appearance by attorney is not error.

(a) Fitz. Attorney 20. Br. Attorney 56. Br. Error 98. (b) F. N. B. 25. C. (c) 1 Roll. 287, 288, 796. 1 Roll. Rep. 305, 380. Cr. El. 377, 378, 424, 541, 542, 551, 569. Cr. Jac. 420, 441, 442, 581. Poph. 130. 2 Sand. 212, 213. 1 Sid. 449. 1 Mod. Rep. 47, 72, 296, 297. Styles 318. 3 Bulstr. 180. Bridgm. 73, 74, 75. Dyer 262. pl. 63. 9 Co. 30 b. Cr. El. 551. Palm. 228, 232, 233, 245, 252. (d) 1 Roll. 584. Postea 62 a. Cr. Jac. 211. March 95. Br. Departure in Despite, &c. 13. Hob. 70. *Parker v. Lawrence*, 21 E. 4. 39 a. (e) Cro. Car. 551. March 95.

(n) By stat. 21 Jac. 1. it is enacted that, after verdict for the plaintiff, judgment shall not be stayed or reversed by reason that the plaintiff in ejectment or other personal action or suit, being an infant under the age of twenty-one years, did appear by attorney therein; and by statute 4 Ann. c. 16. s. 2. after judgment by confession, *nil dicit*, *non sum informatus*, in any court of record, or after writ of inquiry executed. But in all actions real, personal, or mixed, if an infant defendant appear by attorney, it is still error. Rolle's Ab. Attorney A. Error I. 13. *Bostwick v. Bostwick*, 2 Leon. 189. *Orde v. Mereton*, 1 Bulst. 129. *Row v. Long*, Cro. Jac. 4. *Randall's case*, Moor 460. *Sedburgh v. Raunt*, Cro. Eliz. 569. *Odell v. Moreton*, Cro. Jac. 254. *Bishop of Landaff v. Lewys*, W. Jones 432. *Colton v. Wescol*, Cro. Jac. 420, 441. However, if an infant defendant appear by attorney, the Court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian, *Hindmarsh v. Chandler*, 7 Taunt. 488. S. C. 1 B. Moore 250. And if the attorney undertake to appear for the defendant an infant, the Court will oblige

to have appeared in proper person: but yet it is not error; for if the Court admits the plaintiff or defendant by attorney, where he ought to appear in person, it is not error; as in 37 H. 6. 27 b. if the Court admit one upon a *capias*, or *Exigent*, by attorney, where *de rigore juris* he ought to appear in person, it is not (a) error (b), F. N. B. 25. acc. To that, it was answered and resolved, that there is a difference between cases where the defendant or tenant cannot by the law appear by attorney, and cases where the defendant or tenant may appear by attorney: but upon some process, by reason of some default or contempt, he ought to appear in person. In the first case, if the Court admit the defendant or tenant by attorney, it is error: but in the other not (c): as if an infant is admitted to appear by attorney, it is error (B), &c. but when the defendant may make an attorney, and the reason that compels him to appear in person is the contempt to the Court; there the Court may dispense with the contempt, in their discretion, and admit him by attorney, and that is no prejudice to the plaintiff: but in the case at bar, the law requires him to appear in proper person to make the *Retraxit*, because it shall be a perpetual (d) bar, and in a manner as a (e) release, and the admittance of the Court cannot prejudice the plaintiff in so high a degree. But in dilatory matters, the admission of the Court may turn the plaintiff or demandant to delay, but shall never bar the plaintiff or demandant: as if the Court grants process against the

him to do it in a proper manner: and if the appearance is entered to be by attorney, the Court will amend the record; *Goodright v. Wright*, 1 Strange 33. *Stratlan v. Burgess*, ib. 114. Vin. Ab. Attorney A. pl. 18. but the Court will not amend the record, if there be no undertaking, *Power v. Jones*, 1 Strange 445.

A judgment against several defendants being entire shall be reversed for the infancy of one, if they appeared by attorney; for the judgment is entire. 1 Roll. Ab. 776. Error E. pl. 9. *Bird v. Orms*, Cro. Jac. 289. *King v. Marlborough*, Cro. Jac. 303. *Grell and Others v. Richards*, 3 Lev. 294. *Oates v. Aylett*, Aleyn 74. But if an infant defendant appear by attorney, and obtain judgment, the plaintiff cannot reverse the judgment by writ of error. *Bird v. Pegg*, 5 Barn. and Ald. 418.

According to *Frescobaldi v. Kinaston*, 2 Strange 783. infant executors may sue: but they cannot be sued by attorney. But even since the statute, the plaintiff's infancy may be pleaded in abatement, *Foxwist v. Tremaine*, 2 Saund. 212.

witnesses (a), or grants view or aid (b), where it is not *grantable, it is not (c) error, as it is held in 5 H. 7. 8 b. and 8 H. 7. 9 b.; and the reason is given there, because the demandant has not any prejudice of his right, but only a delay. But if the court admit a (d) voucher, where it ought not to be, it is error, as it is held 8 H. 7. 11 a. The same law if an *essoign* be cast and allowed where it is not allowable, it is not error: but to deny any of these † dilatories, where of right the Court ought to grant them, is error, as appears in the said books, and 21 E. 4. 65 b. 22 E. 4. 15, &c. And a (e) *Retraxit* is always on the plaintiff or demandant's part, and a (f) departure in despite of the court is always on the defendant or tenant's part; and the entry there is, *Quod tenens recessit in contemptum curiæ*, and in one case the plaintiff or demandant is barred, and in the other case the plaintiff or demandant shall have judgment presently (g); *Qui semel actionem renunciavit amplius repetere non potest*. Vide for these matters, 20 E. 2. Excommengement 28. 4 E. 3. 23. in *Formedon*. 6 E. 3. 31, 32, 34 a. in *Quare impedit*. 8 E. 3. 3 b. and 68. 38 E. 3. 13. 16 R. 2. tit. *Cause de remover Plea* 12. 3 H. 4. 2. 11 H. 4. 94. 3 H. 6. 13. 9 H. 6. 58. 39 H. 6. 16. 33. *Prisot*. 7 H. 7. 39. Vide tit. *Departure en Despite del court*, Brooke.

2. It was resolved, that the plaintiff in this case ought to be (h) amerced, for it is a stronger case than the case of a nonsuit, which is but a default or non-appearance: but a *Retraxit* is a voluntary acknowledgment that he hath no cause of action, and therefore he will no farther proceed, &c., and therefore it is a bar for ever. And it was objected, that the plaintiff should not assign that for error, because it was for his advantage that he was not amerced, and a man shall never assign that for error which is for his (i) advantage, 7 E. 3. 25 b. by Herle, 8 H. 5. 2 b. 11 H. 4. 8. F. N. B. 21. as to say, that he was *essoigned*, where he ought not to be *essoigned*; or that he had a longer day than the common day; or that aid was granted to him where it was not grantable. To which it was answered and resolved, that it is true that in process or delay, which is for the advantage of the party, he shall not assign it for error; but in the case at bar the judgment is not (§) perfect, for the amercement ought to be parcel of the judgment; and it is also for the King's advantage, and therefore divers judgments have been reversed in the King's Bench, because the judgment was *ideo in (¶) misericordia*, where it should be, *capiatur*; and yet it was for the (k) parties' advantage; but because the judgment was erroneous, and the error of the Court in giving it; for this cause it hath been often adjudged, that it is not amendable, but the whole judgment shall be reversed (c). Vide

of the amercement is error. § 1 Roll. 769. || 1 Roll. 769. (4) Cr. El. 84. Cro. Jac. 211. Cro. Car. 505. 2 Sand. 47. 1 Roll. 759, 760. Jenk. Cent. 283.

(a) 5 H. 7. 9 a.
[* 59 a.]
Fitz. Process
111.
(b) 21 E. 4. 65 b.
(c) 5 H. 7. 8 b.
9 a.
(d) Br. Error,
151.
† Hob. 47.
29 Co. 16 a.

(c) 1 Roll. 584.
2 E. 4. 8 b.
Co. Lit. 139 a.
(f) F. N. B. 78
f. Co. Lit. 139
a. 19 E. 2. Fitz.
Villanage, 31.
(g) Co. Lit.
139 a.

2. In a *retraxit*
by the plain-
tiff, he ought
to be amerced.
(h) Cr. Jac. 211.
64. 1 Roll. 759.
Jenk. Cent. 283.

(i) F. N. B. 21 f.
5 Co. 39 b.
7 Co. 4 b. Palm.
39, 40. 2 Sand.
46. 1 Roll. 757,
759, 760.
Fitz. Error 92.
Hob. 180.

In process or
delay, which is
for the advantage
of the
party, he shall
not assign it
for error, but
the amercement
is parcel
of the judgment,
and the
judgment is
not perfect
without it, and
the omission

(c) Acc. Bac. Ab. Error, K. 4. In *Gamon* "an invariable rule, that if a judgment be
v. *Jones*, 4 T. R. 510. Buller J. said, "It is "more favourable for the plaintiff than he
v 2

(a) Dyer 89. pl. 111.
 (b) Dyer 315. [* 59 b.]
 pl. 99. 1 Roll. 769. Moor 768.

29 Ass. pl. 26. 7 E. 6. Dyer (a) 89. 14 El. Dyer (b) 315. *Vide* now the doubts there well explained. And because it is so *material in all judgments to know when the plaintiff or defendant, and when the defendant or tenant, shall be amerced or fined, inasmuch as the mistaking thereof makes the judgment erroneous, it is very necessary to understand the true sense of the law in these cases (d).

(c) Co. Lit. 126 b.

And this word (c) (*finis*) hath divers significations in the law, *quia aliquando significat pretium, aliquando pœnam, et aliquando pacem*. For, 1. the price, or sum, which is the cause of obtaining a benefit, is called a fine, as fine in the hamper for the King's writs, fine for alienation, fine for admission to a copyhold, fine for obtaining leases, and such like. 2. That which the offender gives in satisfaction of his offence is also called a fine, and in that sense *dicitur pœna*. And, 3. The assurance which makes men enjoy their lands and inheritances in peace, is called *finis, quia finem litibus ponit*. And all these are called fines, because they are the end, or causes of the end, of all the said businesses.

(d) Co. Lit. 126 b.
 8 Co. 39 a.

(d) Amercement is in Latin called *misericordia*; and the cause thereof is, because by the common law (which is a law of mercy) no man ought to be amerced so much as he deserves, but less. *Vide F. N. B. 76*.

Fine. 1. In all actions, *Quare vi et armis*, if judgment be given against the defendant, he shall be fined and imprisoned.

1. In all actions *Quare vi et armis*, as *Rescous, Trespass vi et armis*, &c., if judgment be given against the defendant, he shall be fined and imprisoned, for to every fine (e) imprisonment is incident; and always when the judgment is, *quod defendens capiatur*, it is as much as to say, *quod capiatur quousque finem fecerit*. *Vide* 19 H. 6. 8 b. 34 H. 6. 24. 11 H. 4. 25. 30 Ass. pl. 28. And if there be divers defendants, they shall be severally fined. So in an Assise, if the disseisin be found with force, the defendant shall be fined and imprisoned; otherwise it is if the disseisin be found without force; for there he shall only be amerced, for the writ of Assise doth not mention *vi et armis*, but, *injuste et sine judicio disseisivit*, 33 H. 6. 21 a.

(e) Co. Lit. 126 b.

2. In a writ of Deceit upon a real action upon a recovery by default, if it be found on examination, that the tenant was not lawfully summoned, the judgment shall be, *Et prædict' defend' pro falsitate et deceptione prædict' capiatur*: and the writ of Deceit is, *Ostensum est nobis ex parte A. quod B. in curia nostrâ falso et in deceptione curiæ recuperavit scisinam*, &c. and

2. Fraud and deceit to the Court.

" is entitled to, he cannot take advantage of it, because he is not injured by it." But perhaps this is to be taken with the limitation in the text, *supra*. *Vid. Dunn v. Crump*, 3 Brod. and Bing. 309. S. C. 7 B. Moore, 137.

(d) By 16 and 17 Car. 2. after verdict no judgment shall be reversed for want of a *misericordia* or *capiatur*; or because one is entered instead of the other; and by stat. 5 & 6 W. and M. c. 12. no writ of *capias*

shall issue for the fine, but the plaintiff shall pay 6s. 8d., and be allowed it against the defendant among his costs. *Vid. Harg. n. 4. Co. Lit. 161 a.* And by stat. 4 Ann. c. 16. § 2. all the statutes of jeofails are extended to judgments on confession, *nihil dicit* or *non sum informatus*; and *vid. Davies v. Hoyle*, 1 Strange 574., that where a *nolle prosequi* is entered, the plaintiff need not be amerced.

that is the cause, *scilicet*, the deceit to the Court in obtaining the said judgment, that he shall be fined and imprisoned; but in an action personal, the deceit between party and party, which is in the nature of an action upon the case, there the defendant shall not be fined and imprisoned, but only amerced, for there is no deceit done to the Court, but to the party.

*3. If the defendant, or tenant, pleads a false deed to him, or (a) denies his own deed, and it is found against him, or if he (b) *relicta verificatione cognoscit actionem*, he shall be fined for his falsity, *quia certi debemus esse de proprio facto*; and if he denies his (c) ancestor's deed, or pleads a deed to his ancestor, and it is found against him, yet he shall not be fined, but amerced only, *quia de alieno facto*. And so you will better understand your books in 3 E. 6. Dy. 67. 26 Ass. p. 5. 33 H. 6. 54 b. 34 H. 6. 20 a. b. But if he denies a recovery, or other record to which he is party, he shall not be fined, 10 Ass. p. 10. 16 Ass. p. 19. for it is not his act, but the act of the Court; and he doth not deny the record absolutely, but *non habetur tale recordam*.

64, 420. Kelw. 42 a. (b) 1 Roll. 224. 33 H. 6. 54 b. 2 Roll. Rep. 45. Fitz. Fines 16. 9 E. 4. 24 a. b. Fitz. Fines 25. Dy. 67. pl. 19. Noy 4, 31. Cro. Jac. 64, 420. 2 Sand. 191. Raym. 195, 202. 1 Mod. 73. (c) Br. Amercement 5. Cr. Jac. 255. 2 Sand. 192.

4. If the defendant in a Replevin claims property falsely, and it is so found in (d) *proprietary proband*, he shall be fined and imprisoned, 11 H. 4. 4.

of justice, so that he cannot have the use of the cattle of his plough, or other goods. (d) 11 H. 4. 4 b. 5 a. Co. Lit. 145 b. Br. Fine pur Contempt 14. Br. Return de Brief 108. Fitz. *Proprietary probanda* 1. Br. *propr. prob.* 14.

5. In (e) appeal (e) of death, robbery, or any other appeal of felony or maihem, if the plaintiff be barred, or if he bet nonsuit, or if the writ abate by his own default, he shall be fined and imprisoned, 8 H. 4. 17 a. 20. for the malice is the highest which concerns life or member.

5. For malicious suit in law, which concerns a man's life.

(e) Fitz. Corone 73. Br. Appeal + Co. Lit. 127 a.

6. So in Attaint (f) 32 Ass. p. 9. 42 E. 3. 26 b. if the plaintiff be nonsuit, or barred, he shall be fined and imprisoned. So if the Attaint pass against the defendant if he were party to the first record, he shall be fined and imprisoned; but if he were not party to the first record, as tenant by receipt, or other terretenant, he shall not be fined, 14 Ass. p. 2. 42 E. 3. 26 b. 9 E. 4. 33.

6. Malicious suit in law to attain a jury of perjury.

7. Where any uses the countenance of the law, (which was instituted to make an end of controversies and vexation) for double vexation, he shall be fined: as if a man (f) sues in the Common Pleas, and afterwards, for the same cause, sues him in London, or any such Court, the plaintiff shall be fined for this unjust vexation, 9 H. 6. 55. 14 H. 7. 7 a. and in a (g) Recaption the plaintiff shall recover damages, and the defendant shall be fined and imprisoned for his double vexation.

7. For double vexation by colour of law.

(f) Br. Fine pur Contempt 24. 7 H. 6. 36 b. (g) 11 Co. 43 b. Antea 41 a. F. N. B. 73 d.

(e) Appeals of murder, treason, felony, (f) Writs of attain are abolished by stat. or other offences, abolished by stat. 59 Geo. 6 Geo. 4. c. 50. § 60. 3. c. 46.

8. Contempts
against the
King's writs.

[* 60 b.]

9. Contempt
against a sta-
tute.

(a) 2 Inst. 131.
Cro. Jac. 538.
Cro. Car. 560.
2 Bulst. 328.
1 Sid. 233. 12
Co. 134. 2 Roll.
222.
(b) 2 Inst. 131.

10. A Court
which is not of
record shall
never impose a
fine.

(c) 11 Co. 43 b.
Postea 120 a.
F. N. B. 73 d.
Antea 41 a.
(d) Co. 10. 103
a. Postea 120 a.
Antea 41 a.
Salk. 200.
1 Salk. 200.
Ante 38 b.
8 Co. 41.

(e) 6 Co. 11 b.
Co. Lit. 58 a.
Godb. 49.
1 Roll. 543.
4 Co. 33 b. Cr. El. 792. Cr. Jac. 582. 4 Inst. 266, 268. 21 E. 4. 66 b. 9 Co. 48 b. 49 a. 1 Mod. Rep. 171. 12 H. 7. 16, 17. 7 E. 4. 23 a.

Amercement.

1. In all writs
of *præcipe*,
quod reddat,
quod permittat,
quod faciat,
on nonsuit,
bar, or writ
abated for want
of matter or
form, the King
shall have
amerceament.
Writ abated by
act of God, &c.
no amercement. Fitz. Amerceament 13. Br. Amerceament 12. Co. Lit. 127 a.

8. For all contempts done to any Court of record, against the King's command by his writ under the great seal, the offender shall be fined and imprisoned as in *Quare non admisit*, *Quare incumbravit*, Attachment upon Prohibition, &c. *Vide* 19 E. 3. *Quare non admisit* 7. 23 E. 3. 22. 26 E. 3. 75. 20 E. 2. Coron. 233. Stanf. 132. The stat. of 25 E. 3. c. 6. &c. but when the demandant, or plaintiff, or the tenant or defendant *se retraxit*, or *recessit in contemptum curie*, yet there is no contempt *against the King's command by his writ. And by these differences you will better understand your books in cases of fines and imprisonment, and learn the true reason and sense of the law.

9. In all cases, where a thing is forbid by any (a) statute, the offender shall be fined and imprisoned, 35 H. 6. 6 b. 19 H. 6. 4. in Maintenance. *Vide* 9 E. 4. 28. And that is the reason, that where the statute of Marlebridge, c. 15. forbids, *quod nulli de cætero liceat ex quacunque causa district' facere extra feodum suum, nec in Regia via, vel communi strata*; that the party who is distrained in the highway cannot plead it in bar of the (b) avowry, for then the King should lose his fine, but shall be driven to an action on the statute, in which the King shall have his fine, and therewith agreeth 11 R. 2. Avowry 87. *Vide* 19 E. 2. Brief. 842. 21 E. 3. 11. 39 E. 3. 20. 43 E. 3. 30. F. N. B. 90. & 173. Register 97.

10. In some action the defendant shall be fined in one Court, and but amerced in another Court, and yet the offence shall be all one; as in a writ of (c) Recaption, if it be brought in the Common Pleas, and judgment be there given, the defendant shall be fined and imprisoned as hath been said: but if the writ be brought in the county court, and the defendant be convict before the Sheriff in the county, the judgment shall not be, *quodd capiatur, quia nulla curia que (d) recordum non habet, potest imponere finem, neque aliquem mandare carceri, quia ista spectant tantummodo ad curias de recordo*, and therefore in such case he shall be only amerced. And although the writ, *scil.* the Recaption is of record, yet forasmuch as the Judges in the Court, *scil.* the suitors, are not judges of record, nor the Court is of (e) record, they cannot impose a fine, or commit any to prison. And so in all the like cases. *Vide* F. N. B. 73 d. 8 E. 4. 5. 34 H. 6. 24.

11. In all writs of *Præcipe quod reddat*, as writ of Right, *Formedon*, or writ of Aiel, &c. writs of entry, &c. *Præcipe de quod permittat*, as to have estovers, common, &c. or *Præcipe quod faciat*, as writ of customs and services, &c. if the demandant be barred, or if he be nonsuit, or if his writ abate because it is ill in matter or form, the demandant shall be amerced. But if there be two demandants, and the writ abate for the death of one of them, the other shall not be amerced, 28 (48) E. 3. 23 a. 46 E. 3. tit. Accompt. 40. 5 E. 3. 3. 22 H. 6. 7. 38 E. 3. 31. 7 H. 6. 36. 41 Ass. 14. So in all the said writs

And now concerning amercement.

1. In all writs of *Præcipe quod reddat*, as writ of Right, *Formedon*, or writ of Aiel, &c. writs of entry, &c. *Præcipe de quod permittat*, as to have estovers, common, &c. or *Præcipe quod faciat*, as writ of customs and services, &c. if the demandant be barred, or if he be nonsuit, or if his writ abate because it is ill in matter or form, the demandant shall be amerced. But if there be two demandants, and the writ abate for the death of one of them, the other shall not be amerced, 28 (48) E. 3. 23 a. 46 E. 3. tit. Accompt. 40. 5 E. 3. 3. 22 H. 6. 7. 38 E. 3. 31. 7 H. 6. 36. 41 Ass. 14. So in all the said writs

of *Præcipe*, if judgment be given against the tenant, he shall be amerced.

*2. In all personal actions, as debt, detinue, and the like actions, without force or deceit to the court, and also in actions which comprehend force or deceit to a court of record; if the plaintiff be barred, nonsuit, or the writ abate because it is vicious in matter or form, he shall be amerced only, and not fined; but if the writ abate by the death of one plaintiff, or if one plaintiff appeareth, and the other be (a) nonsuit (which in law in personal actions is a nonsuit of both) he who surviveth, or appeareth, shall not be amerced; for no default is in him, but he only who appeareth not, 47 E. 3. 6 b. & 43 Ass. pl. 3. 7 H. 6. 36. 38 E. 3. 31. 41 Ass. 14. And in the same actions, which are without force or fraud to the court, the defendant shall be amerced.

3. If one demandant in a (b) real action, or one plaintiff in a personal action where (c) summons and severance lieth, as in debt by executors, if one demandant or plaintiff be nonsuit, and the other sueth forward, he who is nonsuit shall not be amerced, 28 H. 6. 11 b. 21 E. 4. 77 b.

4. In all judicial process, if the plaintiff be barred, nonsuit, or if the writ abate, the plaintiff shall not be amerced, because the process is founded upon a judgment and record, 11 H. 4. 55 b. in (d) *Quid juris clamat, Scire facias, &c.* 21 E. 3. 23. 9 E. 3. 32. in *Per quæ servicia*, 18 Hen. 6. tit. Pledges 1. And in these actions the plaintiff shall not find (e) sureties, because he shall not be amerced.

5. In all actions real and personal, if part be found for the demandant or plaintiff, and part against him, or all or part against one tenant or defendant, and nothing, or but part, against the other, the demandant or plaintiff shall be (f) amerced; unless no default be in the demandant or plaintiff, and therefore in trespass of battery against husband and wife, supposing the battery to be done by them both, and the wife is only found guilty, &c. and the husband acquitted, yet the plaintiff shall not be amerced, for the plaintiff could not have another writ in such case, and therefore no default in him. *Vide* 22 Ass. 8. 7 Ass. pl. 14. 31 Ass. pl. 31. Br. Amercement 42. 40 E. 3. 40 a. 21 H. 6. 41. a.

6. In all actions real or personal, where there is but one tenant or defendant, he shall not be twice amerced, but there, where there is but one demandant or plaintiff, and divers defendants, the plaintiff may be divers times (g) amerced, 9 E. 3. 6. 31 Ass. pl. 31. 21 H. 6. 41. a. 40 E. 3. 40. a.

7. Upon discontinuance in a real or personal action, the demandant or plaintiff shall not be amerced, for that is the act of the court, *38 E. 3. 31 a. The same law, and for the same cause, when the court is ousted of jurisdiction, 18 E. 3. 7.

8. In all actions real or personal (in which there is not contained any certain force or deceit to the court) if the tenant or defendant comes the first (h) day, and render the thing in demand to the demandant or plaintiff, he shall not be amerced;

not be amerced unless the action imports force or fraud. (A) Cr. Car. 561. 1 Roll. 212. 8 R. 2. Amercement 26. Cr. El. 65. 14 E. 3. Amercement 16.

[* 61 a]
2. In personal actions.

Death or nonsuit of one of the plaintiffs.
(a) Co. Lit. 127 a. Br. Amercement 11. Fitz. Amerc. 11.

3. One demandant or plaintiff nonsuited.

(b) Br. Amer. 3.
(c) Br. Amer. 48.

4. In judicial process no amercement.

(d) 11 H. 4. 7 a. Br. Amercement 16.
(e) F.N.B. 31 f. Cro. Jac. 414.

5. Part found for the demandant or plaintiff &c. and where part against one tenant or defendant, &c.
(f) Cr. Jac. 630. 1 Roll. 787. Cro. Car. 178. 453. Cro. El. 257. 1 Sid. 232. Br. Amercement 2, 7, 29. Br. Executors 76. Hob. 127.

6. One tenant or defendant shall not be twice amerced.
(g) 5 Co. 58 b. Cro. Car. 178.

7. On discontinuance, or when the court

[* 61 b.]
is ousted of jurisdiction, no amercement.

8. Tenant or defendant comes the first day, &c. shall
Co. Lit. 126 b.

for he doth what the King commands by his writ ; for where the writ is, *Præcipe quod reddat*, &c. that in judgment of law is, that he render it at the return of the writ in court, and not in the country, as it is resolved in (a) Vaughan's case, in the Fifth Part of my Reports, fol. 49. and there the cause of the amercement of the tenant or defendant is well explained. But in actions in which the offence is supposed with force, or in deceit of the court, if the defendant at the first day confesses the action, yet he shall be fined and imprisoned ; for his appearance and confession are a manifestation of, and no satisfaction for, his offence.

(a) Jenk. Cent.
258. Moor 394.

9. The judgment when the writ abates by matter or form, or when the demandant is barred,

The judgment on a nonsuit.

(b) Cr. Jac. 713.

(c) F. N. B. 76 a. The judgment in a Retraxit.

10. Persons who shall not be amerced.

(d) Co. Lit. 127. a. 133 a. Cr. Car. 161. Cr. Jac. 414. 3 Bulst. 276. 1 Roll. 214. Palm. 518, 519. 520.

3. Although the Plaintiff in the principal [* 62 a.] case in proper person had made a *retraxit*, yet he might have a writ of error, either in the judgment or in the proceeding.

(e) Co. Lit. 127 a. 3 Bulst. 276. 1 Roll. 215. 214, 215. Palm. 518, 519, 520. Mo. 394. 1 Mod. Rep. 47. 296. Dyer 338. pl. 41. 2 Keb. 698. Bulstr. 172. 3 Co. 49 a. (g) Fr. Jac. 548. 2 Roll. Rep. 128. Fitz. Er. 78. Postea 62 a. Jenk. Cent. 282. F. N. B. 22 c. (h) Cr. Jac. 548. 2 Roll. Rep. 188. Fitz. Error 78. Antea 61 b. Jenk. Cent. 283.

9. In all cases when a real or personal writ doth abate for want of form or matter, or the demandant or plaintiff be barred, the judgment is, *Quod petens, sive querens nihil cap' per breve suum præd' sed sit in Misericord' pro falso clamore suo inde, et præd' ten' seu def' eat inde sine die*. And in all such cases the estreat out of the Common Pleas into the Exchequer, which the Clerk of the Warrants makes in such cases is, *De A. pro falso clamore suo versus S. in placito, &c. Vide F. N. B. 76 A.* But if the demandant or plaintiff be nonsuit in any action (certain special cases excepted) the judgment is, *Ideo considerat' est quod præd' (b) querens et plegii sui de proseguendo sint inde in misericordia, &c. et præd' def. eat inde sine die* ; and there the estreat is, *De Johanne N. pro se et pleg' suis, quia non prosecutus breve suum versus B. in placito, &c. Vide (c) F. N. B. 76.* But in case of Retraxit the judgment is, *Quod nihil cap' per breve suum præd', sed sit in misericor' pro fals. clam', &c.*

10. There are some persons who shall not be amerced, and therefore they shall not find (d) sureties ; some for the dignity of their persons, as the King (c) ; and so the Queen, for as to that she partakes of the King's prerogative. *Vide F. N. B. 31. f. 47. C. 101. A. 18 E. 3. 2. Br. tit. Amercement 53.* Some for imbecillity of age, as (f) infants, and therefore they shall not find sureties ; but the entry is, *Ideo in misericord', sed pardonatur quia infans. Vide 43 Ass. 45. 44 E. 3. tit. Amercement 10. 3 E. 3. Infant 14. 14 Ass. pl. 17. 41 Ass. p. 14. 17 E. 3. 75. Bract. folio 254. F. N. B. 195 h.*

3. True it is, if the tenant (g) disclaim, he shall not have a writ of error against his own disclaimer because by his disclaimer he hath barred* himself of the right of the land, for the words of disclaimer of the tenant are, *Nihil habet, nec habere clamat, in terra illa, nec die impetrationis brevis originalis præd', &c. habuit, sive clamat, sed aliquid in terra illa habere deavocat, et disclamat* ; and against that he cannot have a writ of (h) error to have restitution of the land against this disclaimer. *Vide 6 Edw. 3. 7. & F. N. B. 22. C.* And if the *Retraxit* in the case at bar had been duly made, it was objected, that against it no writ of error lay ; but here the *Retraxit* itself was erroneous ; because the attorney did it where it ought to be done

(f) Co. Lit. 126, 127 a. Cr. Car. 160, 410. 3 Bulst. 276 h. Reg. Orig. 224 a. 1 Roll. 214, 215. Palm. 518, 519, 520. Mo. 394. 1 Mod. Rep. 47. 296. Dyer 338. pl. 41. 2 Keb. 698. Bulstr. 172. 3 Co. 49 a. (g) Fr. Jac. 548. 2 Roll. Rep. 128. Fitz. Er. 78. Postea 62 a. Jenk. Cent. 282. F. N. B. 22 c. (h) Cr. Jac. 548. 2 Roll. Rep. 188. Fitz. Error 78. Antea 61 b. Jenk. Cent. 283.

in (a) proper person. Also the plea was discontinued, as appears by the record. And forasmuch as the tenant or defendant after departure in despite of the court might have a writ of error, or if he had an estate for life or in tail, *quod ei de forceat*, F. N. B. 155. l. and the defendant or tenant against his own (b) confession may have a writ of error; it was resolved, that although the plaintiff in proper person had made a *Retraxit*, yet he might have a writ of (c) error, either in the judgment or in the proceeding: for no imperfection is saved in such case by any statute when judgment is given upon *Retraxit*, and it is no more than confession on the part of the defendant; for the effect of the entry of a *Retraxit* is, *Quod idem* (d) *querens fatetur (seu cognovit) se ulterius nolle prosegui versus def. de placito præd'*, which confession is (e) a bar in all actions, although the words are *de placito suo prædicto*, and therefore it is not like a disclaimer, by which the tenant disclaims and bars himself absolutely of all his right in the land.

4. It was resolved, that the entry of the said *Retraxit* was insufficient; for it appears by the precedents that there are sundry manners of entries of a *Retraxit*: after both parties have appeared in court, the entry is, *Et (f) postea eodem die revenit hic ad barram præd' tenens per attorn' suum præd' et præd' petens tunc solemniter exactus non venit, sed a secta sua præd' in contempt' cur' se retraxit, ideo consideratum est quod petens nihil capiat per breve suum præd' sed sit in misericordia pro falso clamore suo inde, et quod prædictus tenens eat inde sine die.* And that appears, Trin. 5 H. 6. Rot. 320. in Com' Banco. Another form of a *Retraxit* is, *et super hoc idem quer' dicit, quod (g) ipse non vult ulterius placitum suum præd' prosegui, sed abinde omnino se retraxit, &c. Ideo, &c.* Another form is, *quod idem (h) querens fatetur se (seu cognovit se) ulterius nolle prosegui versus præd' defendent', &c. de placito præd.* And the entry of departure in despite of the court on the part of the tenant is, (i) *et prædictus A. licet solemniter exactus non revenit, sed in contempt' cur' recessit et default' fecit.* And that is when in judgment of law he is present in court, and being demanded*, departs in despite of the court, that amounts to a bar in respect of the despite and contempt of the court; and yet the judgment is there given upon his default, as appears before. Otherwise where he imparles to a certain day; for there he is not, in judgment of law, present in court; and so the difference. Vide 20 Ed. 2. Excom. 28. and all the books aforesaid. And if the writ abates for false Latin, or other matter of form, upon plea to the writ, the judgment is, *Quod præd' tenens, or defendens eat inde sine die.* And also if the demandant, or plaintiff, be upon a bar pleaded, &c. by judgment to be barred, the words of the judgment are all one, *scilicet quod præd' tenens, or defendens eat inde sine die*; and always the judgment shall have relation to the plea, *scil.* if upon a plea in bar, then the judgment shall be applied to it: if to the writ, then the judgment shall be applied to the writ only, and not in bar; and therewith agree the books in 3 H. 4. and 3 H. 4. 11.

(a) Antea 58 a.
1 Roll. 584. Co.
Lit. 138 b. 139
a. Cro. Jac. 211.
Jenk. Cent 283.

(b) F. N. B. 21
k.

(c) Antea 59 a.

(d) Co. Lit. 138,
139.

(e) Antea 58 b.
Roll. 584. Co.
Lit. 139 a. Cro.
Jac. 211. March
95. Br. Depart-
ure in De-
spight, &c. 13.
21 E. 4. 39 a.

4. The entry of
the *retraxit* in
the principal
case was insuffi-
cient.

(f) Co. Lit. 29.
a.

(g) Antea 58 a.
Co. Lit. 139. a.

(h) Co. Lit. 139
a.

(i) Co. Lit. 139
a.
8 E. 3. 13 b.

[* 62 b.]

4 Geo. 2. c. 26.

(a) Postea 69 a. *Vide* upon plea of excommunication, which doth not (a) abate the writ, 11 R. 2. Excom. 25. the entry is, *remaneat loquela sine die quousque, &c.*
 Lit. sect. 201.
 Co. Lit. 134 b.

[63 a.]

SWAYNE'S CASE,

Mich. 6 Jac. 1.

IN THE COMMON PLEAS.

SWAYNE v.
 BECKET.
 Pt. VIII.—63 a.

A lease of a manor in which there was a custom, that every copyhold tenant for life had used to take all trees growing upon his copyhold lands, to be employed for fuel in his copyhold house, and for bounds and fences, &c. upon the customary lands and tenements, was made for twenty-one years, with an exception of the trees, woods, underwoods, &c. At a court held by the lessees, a house with certain land, upon which certain oak and ash trees were growing, was granted by the steward, by copy of court roll, to one A. for life; according to the custom of the manor. A. lopped the said trees upon his copyhold, and employed them for bounds and fences in and upon his copyhold lands, &c. Held that he might lawfully do so.

Grants by copy shall not be avoided for infancy, coverture, nor in respect of the exility, baseness, or uncertainty of the interests or estates of the lords.

If the lord takes a wife, and grants the land by copy, and dies, his wife being endowed of the said land, shall not avoid the grant. The copyholder, who comes in by voluntary grant, shall not be subject to the charges, &c. of the lord before the grant.

If there be a grant of a rent out of land upon condition, a subsequent feoffment of the same land does not destroy the condition.

Note the difference between prescription and custom. S. C. [Moore 811. 1 Brownl. 231.]

2 Brownl. 208.
 1 Roll. Rep. 96.
 2 Roll. Rep. 179.
 11 Co. 50 b.
 Watk. Copy.
 45, 283, 331.
 Scriv. Copy.
 480.
 13 Rep. 68.

RICHARD SWAYNE, Esq. brought an action of trespass against Walter Becket, *quare clausum fregit*, at Hannington in the county of Wilts, and lopped, &c. ten oaks and fifteen ashes, &c. And upon not guilty, the case, as it was specially found, was such: Queen Elizabeth was seised of the manor of Hannington in the county of Wilts, in fee, in the right of her duchy of Lancaster; and that the said oaks and ashes so lopped were growing upon a yard and half of land, parcel of the same manor and copyhold land, &c. and demiseable for one, two, or three lives; and afterwards the Queen, by indenture under the seal

of the duchy of Lancaster, *anno 29 regni sui*, demised the same manor to John Wolly, Esq. *exceptis omnibus boscis, sub-boscis, arboribus, et marem*, &c. to have and to hold to him (except before excepted) for twenty-one years; who, 35 Eliz., assigned all his interest to John Plumer and others; and afterwards the Queen died; and afterwards the King that now is, by his letters patent under the duchy seal, granted to Alexander Lord Fivy, Richard Swayne, and Peter Whetcombe, *reversionem prædict' ac permissa sic, ut præfertur, except'*, to them and their heirs, to whom the lessees attorned; and afterwards the Lord Fivy, and Whetcombe, by their deed released to Richard Swayne, and his heirs; and at a court held by the lessees, 17 Oct. 3 Jac. Regis, their steward granted by copy of court-roll, to the said Walter Becket, now defendant, &c. a house and the said yard and a half of land upon which the said oaks and ashes were growing, for term of life, *secundum consuetudinem manerii*; and that within the said manor there has been such a custom, that every copyhold-tenant for life hath used to take all trees growing upon his copyhold lands, to be employed for fuel in his copyhold house, and for bounds and fences, and other necessary reparations to be in and *upon the customary lands and tenements; and that the defendant did lop the said trees upon his copyhold, and employed them for bounds and fences in and upon his copyhold lands and tenements, &c. And the doubt was, that forasmuch as the said lessees held the court by virtue of the said lease of the manor (out of which lease the said trees were excepted), if the defendant to whom they, by their steward, granted the said tenement by copy, might lop the said trees, which, by the said exception, were divided from the said lease. And in this case divers points were resolved by Coke C. J. Walmsley, Warburton, Daniel, and Foster, as after appears. But first it was objected, *quod (a) nemo potest plus juris in alium transferre quam ipse habet*; and the lords *pro tempore* who held the court, and made the grant to the defendant, had nothing in the trees, for they were excepted out of their lease; *ergo*, the copyholder who claims by grant of the lessees could not meddle with the trees. But it was answered and resolved *per totam curiam*, that notwithstanding the severance by the (b) exception, and notwithstanding the defendant came in by a voluntary grant of the lords for life, and not by surrender, yet such grantee by copy, should have estovers; for the estate of the copyholder (who comes in by voluntary grant) is not derived out of the estate or interest of the lord of the manor; for the lord of the manor is but as an (c) instrument to make the grant: but the custom of the manor (after the grant made) establishes and makes it firm to the grantee: so that although the grant be new, yet the title of the copyholder is ancient; and so ancient, that by force of custom it exceeds the memory of man. And therefore neither for infancy, *nonsane memory*, coverture, nor

[* 63 b.]

(a) 4 Co. 24 b.
5 Co. 113 a.
6 Co. 57 b. 68 b.
Co. Lit. 309 b.

Resolved, The grantee by copy shall have the estovers.

(b) Moor 812.
1 Brownl. 231.
11 Co. 50 b.
Ante, Vol. II.
p. 385. n. (u).

Grants by copy shall not be avoided for infancy, coverture, nor

fancy, coverture, nor in respect of the exility, baseness, or uncertainty of the interests or estates of the lords. (c) 4 Co. 23 b. 27 b. Co. Lit. 31 b. 59 b. 1 Roll. 503. Cro. El. 361. Bridgm. 51. Moor 112.

(a) 1 Roll. 499.
4 Co. 23 b. 31 b.
Co. Lit. 58 b.
Cr. Jac. 98, 99.

If the lord takes a wife and grants the land by copy, and dies, his wife being endowed of the said land shall not avoid the grant. The copyholder who comes in by voluntary grant shall not be subject to the charges, &c. of the lord before the grant.

2. Where copyholders for life have used to have common &c. in the wastes of the lord, &c. if the

[* 64 a.] lord aliens the wastes, &c. and grants certain copyhold houses and lands for life, the grantees shall have common of pasture, &c. notwithstanding the severance.

(b) Mo. 758, 812.
2 Brownl. 208.
Bridgm. 51.
1 Leon. 16.
2 Siderf. 82.
1 Atk. 442.
† Doct. pl. 81.
(c) 1 Brownl. 231.

If there be a grant of a rent out of land, upon condition, a subsequent feoffment of the same land does not destroy the condition.—Note the difference between prescription and custom.

other such disabilities, neither in respect of exility, baseness, or (a) uncertainty of the interests or estates of the lords (as at will, or upon condition, &c.) the grants by copy shall be avoided, because they claim in, by force of a good and ancient custom, which hath no disability of person, or defect of a perfect interest. And *Pasch. 26 El. in Banco Regis*, it was adjudged, that if the lord takes a wife, and afterwards grants the land by copy, according to the custom, and dies, his wife being (b) endowed of the said land amongst other, shall not avoid the estate by copy; for although her title of dower was before the grant, yet the title of the copyholder, which is the custom, is ancients than the title of dower; and so the copyholder, who comes in by voluntary grant, shall not be subject to the charges or incumbrances of the lord before the grant. And all that, in this case, was affirmed for good law, *per totam curiam*.

2. It was resolved, that when the copyholders † for life, according to the custom, have used to have common in the (c) wastes of the lord of the manor, or estovers in his woods, or any other profit *apprender* in any part of the manor, and afterwards the lord aliens the wastes, or woods, to another in fee, *and afterwards grants certain copyhold houses and lands for lives, such grantees shall have common of pasture, or common of estovers, &c. notwithstanding the severance; for the title of the copyholder is paramount the severance; and the custom unites the common, or estovers, which are but accessaries, or incidents, as long as the house and lands, being principal, is maintained by the custom; which customary appurtenances are not appertaining to the estate of the lord, for he is the owner of the freehold and inheritance of all the manor, but they are appertaining to the customary estate of the copyholder, after the grant made unto him; which profit *apprender* being due by custom to the copyhold tenement (notwithstanding the feoffment or fine, &c. of the waste or woods, made by the lord) remains and is preserved by the custom, which is, as hath been said, the title of the copyholder, and is paramount to the severance: but if the copyholder had derived his interest from the estate of the lord, then clearly by the feoffment or fine, &c. of the lord, all those who after claim by him shall be barred of any profit *apprender* in the same waste or woods: *vide* (d) Murrel's case, in the Fourth Part of my Reports, that after the custom hath fixed a customary interest, no severance of the inheritance shall overthrow the copyhold: and *vide* (e) Brown's case, *ibid*. And if a man grants a rent to another out of his land, on condition, and afterwards makes a feoffment of the land, yet the condition to determine the rent remains, and is not extinct by the feoffment; for it is collateral to the title of the land. And *nota* the difference between (f) *prescription* which is made in the person of any, as he and all his ancestors, &c., or all those

(d) 4 Co. 21 b. Cr. El. 252.
2 Leon. 209. (c) 4 Co. 21 a. Moor 125. 1 Co. 111. Plow. 2. 197. (f) 6 Co. 60 b. Co. Lit. 113 b. 4 Co. 32 a.

whose estate he hath, &c. and custom which lies upon the land, as *infra manerium talis habetur consuetudo*, &c.; and this custom binds the land, as Gavelkind, Borough English, and the like. (a) But after such severance of the waste, or woods, &c. the copyholder, when he entitles himself to common, or estovers, &c. in pleading, shall not plead generally, *quod infra manerium prædict' talis habetur, &c. consuetudo, &c.*; for after the severance, the waste or wood, &c. is not within the manor, but absolutely divided from it: but (b) shall plead that until such a time, *scil.* before the severance, *talis habebatur, et toto tempore, &c. consuetudo, &c.*, and then shew the severance, as he ought in the said case of Murrell, where the lord of the manor aliened the freehold and inheritance of the copyhold. *Vide* 2 H. 6. 9. 11 H. 6. 23. 39 H. 6. 13, 14. 7 E. 4. 52. 20 E. 4. 6 b. 22 E. 4. 44. And Coke, C. J. said, that the said case at bar was a general case; for in all (c) lease of manors made by Queen Elizabeth or the King that now is, such exception of trees and timber, &c. is. And judgment was given for the (d) defendant.

(a) Doct. pl. 81.

(b) Doct. pl. 31.

(c) 11 Co. 50 b.

(d) Moor 812

SIR WILLIAM FOSTER'S CASE,

[64 b.]

Mich. 6 Jac. 1.

The 32 H. 8. c. 2 & 4. extends only to such cases where the avowant was compelled to acknowledge a seisin by force of some ancient statute of limitations; and, consequently, it does not render an allegation of seisin within the limited time necessary, in those cases where seisin was not required to be alleged before the statute, as in the case of a reservation or grant of a rent where the title is founded on the deed.

* Lessee for life, or donee in tail, shall not have *Nec injuste vexes* against the donor.* S. C. 1 Brownl. 169.

COWPER

v.
SIR W. FOSTER.
Pt. VIII.—64 b.

IN a replevin between Barnard Cowper, plaintiff, and Sir William Foster, defendant, for taking his cattle, *ultimo die Augusti, anno quarto Jacobi Regis, apud Stratfield, in com' Berks, in quodam loco vocat' the Rye-piddle*, the said Sir William avowed the taking, as bailiff of Ed. Gregory, Esq. and Mary his wife, administratrix of the goods and chattels which were Thomas Foster's, Gent., and said, that the place where contained three acres of land, parcel of the manor of Bechilwick, in the said county, whereof Charles Foster, Esq. was seised in fee, and 30 Jan. *anno* 4 Ed. 6. by his deed indented, enfeofed of the said manor Richard Pattenham, to him and

his heirs, yielding therefore yearly to the said Charles, his heirs and assigns, *6l. 13s. 4d.* at the feast of St. Michael, and the Annunciation of our Lady, by equal portions, with clause of distress; and afterwards the said Charles Foster died seised of the said rent, after whose death it descended to the said Thomas Foster, as to his son and heir: and afterwards, *scil. 10 Julii, anno 25.*, he died intestate; and because *100l.* of the rent aforesaid was behind, for 15 years; ended 10 El. he avowed the taking, as bailiff to the said husband and wife, administratrix of the said Thomas Foster. The plaintiff in bar of this avowry pleaded, *Quod (a) nec prædictus Tho. Foster nec antecessores sui, nec aliqui alii quorum statum præd' Tho. Foster habuit in reddit' præd' unquam fuerunt scisiti de eodem redditu infra 40 annos jam ultimos clapsos ante prædictum tempus quo, &c.* Upon which the avowant demurred in law. And this avowry is grounded on the statute of 32 H. 8. 37. which gives distress to an executor or administrator, "in like manner and form as the testator, &c. might or ought to have done (A)." But the *matter in law was founded on another act made at the same parliament, (b) cap. 2. (3.) of limitations; for by the same act it is enacted, "That no person or persons shall hereafter make any avowry, or conusans for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or conusans, in the possession of his or their ancestor or predecessor, &c. above forty years next before the making of the said avowry or conusans." And it was resolved *per totam curiam*, that these words ought to be intended where the avowant was driven to allege any seisin by force of any old statute of limitation; and that was when the (c) seisin was material, and of such force that it should not be avoided in avowry, although it were by encroachment, as of rent between the lord and tenant: but in the case of preservation or grant of a rent, there the deed is the title, and the beginning thereof appears, no encroachments in that case shall hurt, nor is any seisin material (b): the same law of a gift in tail, after the statute *De Donis conditionalibus* rendering rent; there no encroachment shall be prejudicial, or seisin requisite, for the reservation is the title, and the beginning thereof appears within time of memory: and this construction stands with

(a) 1 Brownl.
170.

[* 65 a.]
(b) Dyer 315.
pl. 101, 330.
pl. 19.
32 H. 8. cap. 2.
9 Co. 36 a.
1 Roll. Rep. 50.

(c) 1 Brownl.
170. 10 Co. 108
a. Cr. Car. 81.
1 Aaders. 16.
Hettl. 41.
1 Jones 237.
† Doct. pl. 317,
318. 3 E. 4. 24
a. 17 E. 3. 31,
32. Co. Lit. 115.
Gillb. Rep. 189.

(A) Vid. note (a) Ognell's case, Vol. II.
p. 417.

(B) A similar decision was made in a case reported, Anon. Moore, 31. According to Sir William Jones, such exemption should be understood with this qualification, that the certainty of the rent should appear in the deed; because otherwise the quantum or quality of the rent is no more ascertained by the deed, than if there was not one existing. Therefore a rent created by reference to something out of the deed, as by reserving such rent as the person reserving pays over without expressing what that is, the latter rent

not having commenced by deed, is one of which seisin is the proper proof; in such a case, seisin, as Sir William Jones thought, is equally requisite to both rents, and consequently both ought equally to be deemed within the limitation of the 32 H. 8. *Fawtner v. Bellingham*, W. Jo. 238.

Serjeant Hill makes a query in his copy of the Reports, whether, if there had not been a seisin for a great length of time, the law would not presume a release. Vid. the judgment of Abbot, C. J. *Doe v. Hilder*, 2 Barn. and Ald. 791.; and the judgment of Littledale J., *Moore v. Rawson*, 3 Barn. and Cress. 339. S. C. 5 Dow. and Ryd. 239.

the words of the said act; for the words are, "No man shall make avowry, and allege any seisin, &c." By which it appears, that *that* branch extends only where the avowant ought to allege seisin; but when no seisin is requisite, it is out of the words and intent of the act, for it intends to limit a time for the seisin when seisin is required by the law to be alleged, and not to compel any one to allege seisin where seisin was not necessary before. *Vide* Plow. Com. 94. in Woodland's case, *acc.* And so you will better understand your books in 22 Ass. 63. 22 Ed. 3. 18. 30 H. 6. 5 b. 7 Ed. 4. 12 Ed. 4. 7. 20 Ed. 4. 17. 11 H. 7. 11 b. 10 Ed. 3. 25. 20 Ed. 3. Avow. 131. 10 H. 6. 3. 4 Ed. 2. Avow. 204. F. N. B. 10. & 163. *Vide* 8 Ed. 3. 18 b. 1 Ma. Br. Avow. 107. & 14 El. Dyer (a) 315. & 16 Eliz. in (b) Warring's case, in the Common Pleas adjudged, that the avowant need not in his avowry shew seisin within 40 years, but the same shall come on the other part, *scil.* not seised of the services after the limitation. Note, reader, lessee for life, or donee in tail, shall not have (c) *Ne injuste vexes* against the donor; for inasmuch as the reservation is the title, no encroachment upon them shall hurt them, but they shall avoid it in avowry; and the statute of *Magna Charta*, cap. 10. on which the writ of *Ne injuste vexes* is (d) grounded, *scil. quod nullus distringatur ad faciend' majus servitium de libero tenemento quam inde debetur*, doth not extend to donee in tail, lessee for life, or grantee of a rent-charge, which appears by these words, *majus servitium*, which is meant between very lord and very tenant.

(a) 9 Co. 36 a.
Cr. Car. 83.
Hettl. 41. Dyer
315. pl. 101.
7 E. 4. 29 a.
(b) Cr. Car. 83.
Hettl. 41.
(c) F. N. B. 11 d.

(d) 2 Inst. 21.
9 Co. 33 b.
Plowd. 243 b.

LOVEDAY'S CASE,

[65 b.]

Mich. 6 Jacobi I.

On an information for usury, if the verdict find the corrupt agreement, but say nothing as to the loan, it is bad.

When a jury returned by force of any *venire facias* to try an issue has given a verdict, which is accepted and recorded by the Court, be it perfect or imperfect, the jurors are discharged thereof for ever, and shall never be called back in the same cause to try the same issue: but if the verdict be so imperfect that judgment cannot be given upon it, then the Court shall award a *venire facias de novo*.

S. C. [Cro. Jac. 210. Jenk. 283.] Vid. the entry, Co. Ent. 393. nu. 17.

COOK
v.
LOVEDAY.
Pt. VIII.—65 b.

In an information in the Exchequer upon the statute of usury, 1 Lev. 310.
by C. *qui tam*, &c. against Loveday, the defendant pleaded to issue, and a jury was returned who gave an imperfect verdict,

(a) [Bridg. 112,
113.

for they found an acceptance, &c. and no (a) loan, &c. wherefore the Court awarded a *Venire de facias novo*, and thereupon another jury was returned and appeared; and when they were ready to give their verdict, the plaintiff was nonsuit, upon which judgment was given: and now the plaintiff brought a writ of error in the Exchequer chamber, and assigned for error, that the Court of Exchequer in the said case did err in granting a *Venire facias de novo*; but ought to have granted a new *Nisi Prius*; for an imperfect verdict is as no verdict, as anno 20 Ed. 4. 6 a. an insufficient indictment is as no indictment. And at the common law, if the recognitors of an assise give a verdict which is not well examined by the Justices who take the assise, but is imperfect, for want of good examination, in that case the plaintiff shall have a certificate of assise, and the first imperfection shall be enquired by the first jurors; and that appears in F. N. B. 181 b. 7 H. 4. 45 a. 43 Assise, pl. 5. 12 H. 4. 9. and the words of the writ are, *Quia super quibusdam articulis contingent' assisam novæ disseisinæ, &c. quædam subsunt dubitationes, &c.* But it was resolved by the Court, and the two Chief Justices, that the *Venire facias de novo* was well awarded: for when a jury returned by force of any *Venire facias* to try an issue, has given a verdict which is accepted and recorded by the Court; be it perfect or imperfect, the jurors are discharged thereof for ever, and shall never be called back in the same cause to try the same issue; but if the verdict be so imperfect that judgment cannot be given *upon it, then the Court shall award a *Venire facias de novo* (a), to try the said issue by others (b); and therewith agreeth the Book in 18 Ed. 3. 48 b. where it is resolved, that in a *Cessavit*, because the inquest found part to be held of the defendant, and found not by what services it was held, nor what arrears were behind, and for that reason was not fully taken, that

[* 66 a.]

(b) Acc. 3 B.
and C. 870.

[Q. the case of Oldfield and Lycett in C. B. Mich. 16 Geo. 3. where the plaintiff being nonsuit brought error, after a case made at *Nisi Prius* for the opinion of the Court, which was for defendant, so judgment of nonsuit entered by order of *Nisi Prius*.]—Note to former edition.

(a) A *venire de novo* is also grantable where the jury are improperly chosen, or where there is any irregularity in returning them, or where they have improperly conducted themselves, also where the declaration consists of several counts, and the jury give several damages, and it afterwards appears that one of them is defective, as also upon a demurrer to evidence. Vid. note to *Davies v. Price*, 2 T. R. 126. A *venire de novo* is also grantable, where the jury find less than the whole matter in issue, as also where they omit assessing the damages, *Kynaston v. Mayor, &c. of Shrewsbury*, 2 Strange, 1052. *Eichorn v. Le Maître*, 2 Wils. 367. *Drage v. Brand*, 2 Wils. 377. A *venire de novo* may also be granted by a court of error, as also after a bill of excep-

tions, *Bent v. Baker*, 3 T. R. 36. *Lucerne v. Crawford*, 2 N. R. 329. *Harwood v. Goodright*, Cowp. 91. But in *Trevor v. Wall*, 1 T. R. 151. *Street v. Hopkinson*, 2 Strange 1055., the Court refused a *venire facias de novo* after error from another Court. Vid. *Tidd's Practice*, Vol. 2. 953. 8th edit. *Doe v. Jersey*, 3 Barn. and Cress. 874. By statute 6 Geo. 4. c. 50. § 16., if the plaintiff or defendant in *Quare impedit* or *replevin*, after issuing process, does not proceed to trial at the first assizes, he may sue a *venire facias de novo*: but if the jury be discharged at the assizes, in order to have a view, there is no need of a *venire de novo*. Com. Rep. 248. S. C. 1 Strange 70. Vid. stat. 6 Geo. 4. c. 50. § 23. And in *Dary v. Hobson*, 6 Taunt. 460. where a person not summoned on the jury was sworn at *Nisi Prius* in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded, the irregularity being noticed before verdict, the Court of Common Pleas awarded a *venire de novo*. Vid. note (a) *Codwell's case*, Vol. III. p. 89.

a *Venire facias de novo* should be awarded to return a new jury, and not a new *Nisi prius* to try the same issue again by the same jury. So in (a) 27 H. 6. 4 a. b. in conspiracy against divers, all plead not guilty, and one *Venire facias* was awarded against all, and the Sheriff returned not the writ; and the Sheriff prayed several *Venire facias* against the defendants, and had it, and it was found for the plaintiff, and all the Justices adjudged it a jeofail, so that the plaintiff could not have judgment upon the said verdict, which was fully found, forasmuch as the first award was of one joint *Venire*, the plaintiff could not vary, (to have several writs *de Venire facias*) from the first award; and therefore the Court did award *Venire facias de novo*, 21 Hen. 6. 21. 21 (b) Edw. 4. 26 b. 27 a. And as to the case of (c) assise, the recognitors are not returned to try any certain issue, for there is a jury the first day before any plaint, plea, or issue. 2. There, no new process can be awarded; for the recognitors who are once returned, shall stand: but when a jury is returned on a *Venire facias*, which is a judicial process for the trial of a certain issue, there the Court, if the verdict be imperfect, may award a new judicial process, *scil. Venire facias de novo*; but the Court cannot do so in case of assise, for they are returned on the original; and because the writ of assise *De nova disseisina* is (d) *festinum remedium*, the plaintiff shall have a writ of Certificate of Assise, to supply the first imperfections (which happen for default of good examination) according to the truth of the matter. And judgment was affirmed.

(a) Fitz. Process 94. Br. Replead. 30. Br. *Venire facias* 2, 35.

(b) Br. Enq. 47.

(c) Cr. Jac. 210, 211.

3 Salk. 371.

(d) Ant. 50 a.

EDWARD CROGATE'S CASE,

[66 b.]

Mich. 6 Jacobi 1.

In an action of trespass for driving plaintiff's cattle, &c. defendant pleaded that a house and two acres in B. in the county of N., were parcel of the manor of T. in the same county, and demised and demisable, &c. by copy, &c. in fee-simple, &c. according to the custom of the manor, of which manor W. late Bishop of N., was seised in fee in right of his Church, and prescribed to have common of pasture for him and his customary tenants of the said house, and two acres of land in a great piece of pasture land called B. common, for all cattle, &c. at every time of the year; that the said Bishop at such a Court, &c. granted the said house and two acres of land by copy to one M., to him and his heirs, &c.; that the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant as servant to the said M., and by his commandment, *molliter* drove the said cattle out of the said place, &c.

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The plaintiff replied *de injuria sua propria absque tali causa*; and upon demurrer the replication was held to be bad. And resolved, 1. *Absque tali causa* refers to the whole plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself. 2. When the defendant in his own right, or as servant to another, claims any interest in the land, or any common or rent going out of the land, or any way or passage upon the land, &c. *de injuria sua propria* generally is no plea. But if the defendant justifies as servant, *de injuria sua propria* in some cases with a traverse of the commandment that being made material is good; for the general plea *de injuria sua propria* is properly, when the defendant's plea consists merely upon matter of excuse, and of no matter of interest whatsoever. 3. When by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, although no interest be claimed, the plaintiff ought to answer it, and not reply generally *de injuria sua propria*. 4. In the principal case, the issue would be full of multiplicity of matter, where an issue ought to be full and single.

6 E. 4. 6 a.

EDWARD CROGATE brought an action of trespass against Robert Marys, for driving his cattle in Town Barningham in Norfolk, &c. The defendant pleaded, that a house and two acres in Bassingham in the said county, were parcel of the manor of Thurgarton in the same county, and demised, and demisable, &c. by copy, &c. in fee-simple, &c. according to the custom of the manor, of which manor William late Bishop of Norwich was seised in fee in the right of his bishopric, and prescribed to have common of pasture for him and his customary tenants of the said house and two acres of land *in magna pecia pasturæ vocat'* Bassingham common, *pro omnibus averiis, &c. omni tempore anni*, and the said Bishop at such a Court, &c. granted the said house and two acres by copy to one William Marys, to him and his heirs, &c. And that the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant, as servant to the said William, and by his commandment, *molliter* drove the said cattle out of the said place, where the said William had common *in præd' villam de Town Barningham*, adjoining to the said common of Bassingham, &c. The plaintiff replied, *de injuria sua propria absque tali causa*: Upon which the defendant demurred in law. And it was objected on the plaintiff's part, that the said replication was good, because the defendant doth not claim any interest, but justifieth by force of a commandment; to which *de injuria sua propria absque tali causa* may be fitly applied: and this plea, *De injuria sua propria*, *shall refer only to the commandment, and to no other part of the plea, and they cited the books in 10 H. 6. 3 a. b. 9 a. 16 H. 7. 3 a. b. &c. 5 H. 6. 35 a. 19 H. 6. 7 a. b. &c. But it was adjudged, that the replication was insufficient. And in this case divers points were resolved. 1. That *absque tali causa*, doth refer to the (a) whole plea, and not only to the commandment,

1. Resolution.

(a) Cr. Jac. 599.

2 Leon. 81.

3 Bulstr. 285. Cr. Car. 138.

for all maketh but one cause, and any of them, without the other, is no plea by itself. And therefore in (a) false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant to him there, *de injuria sua propria* generally is no good replication, for then the matter of record will be parcel of the cause (for all makes but one cause) and matter of (b) record ought not to be put in issue to the common people; but in such case he may reply, *de injuria sua propria*, and traverse the warrant, which is matter in fact. But (c) upon such a justification by force of any proceeding in the Admiral Court, hundred or county, &c. or any other which is not a court of record, there *de injuria sua propria* generally is good, for all is matter of fact, and all makes but one cause (a). And by these differences you will agree your books in 2 H. 7. 3 b. 5 H. 7. 6 a. b. 16 H. 7. 3 a. 21 H. 7. 22 a. (33.) 19 H. 6. 7 a. b. 41 E. 3. 29 b. 17 E. 3. 44. 18 E. 3. 10 b. 2 E. 4. 6 b. 12 E. 4. 10 b. 14 H. 6. 16. 21 H. 6. 5 a. b. 13 R. 2. Issue 163.

2. It was resolved, that when the defendant in his own right, or as a servant to another, claims any interest in the land, or any common, or rent going out of the land; or any (d) way or passage upon the land, &c. there *de injuria sua propria* generally is no plea (b). (c) But if the defendant justifies as ser-

(a) Doct. pl.
114. 2 Leon. 81.
2 E. 4. 6 b.

(b) 4 Co. 71 b.
9 Co. 25 a.
Co. Lit. 260 a.
Hard. 6. Com.
Dig. Plead. F.
20.

(c) Doct. pl.
114. Com. Dig.
Plead. F. 19.

2. Resolution.

(d) Cr. Jac. 599.

(e) Doct. pl.
114 g.

(a) In *Robinson v. Bayley*, 1 Burr. 316. the defendant in trespass pleaded a right of common for his cattle, levant and couchant. The plaintiff replied, that they were not his own commonable cattle levant and couchant. The defendant demurred specially, because the replication was multifarious: but the Court held the replication good, the rule being not that issue must be joined on a single fact, but on a single point; and that it was not necessary that this single point should consist only of a single fact. So in *O'Brien v. Saxon*, 2 Barn. and Cress. 908. S. C. 4 Dow. and Ry. 579. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in the sum of 100*l.*, became bankrupt, wherefore defendant sued out the commission. The plaintiff replied *de injuria sua propria*; the defendant demurred, assigning for cause, that the plaintiff by the replication had attempted to put in issue three distinct facts, the act of bankruptcy, the trading, and the petitioning creditor's debt: the Court held, that these three facts connected together constituted but one entire proposition, and that the replication was good. Vid. *Stephen on Pleading* 274.

(b) This resolution in *Crogate's case* has never been disputed, nor called in question: but has always been considered as a leading case upon this subject, *Jones v. Kitchin*, 1 Bos. and Pul. 76. *Bell v. Wardell*, Willes 202. *Langford v. Wagham*, 7 Price 670.

Serjt. Williams's note 1. *White v. Stubbs*, 2 Saund. 295. 7 Vin. Ab. 503. Com. Dig. Pleader F. 19. Doct. plac. 114. Accordingly where, in trespass for taking a gelding, the defendant pleaded that J. S. was seised in fee of the *locus in quo*, and that he as his servant, and by his command, took the gelding, damage-feeasant, it was held that the plaintiff could not reply *de injuria sua propria*. *Cokerill v. Armstrong*, Willes 99. S. C. Comm. 582. Bull. N. P. 93. So a plea *de injuria sua propria*, &c. to a cognizance for rent in arrear is bad. *Jones v. Kitchin*, ubi sup. *Cooper v. Monke*, Willes 52. And vid. *Kilburne v. Valence*, 2 Lutw. 1347. But if the title alleged be only inducement, *de son tort*, &c. may be replied generally; as in battery, if the defendant pleads that he was seised in fee of a close, and had cut the trees, and the plaintiff came to take away his corn, and he in defence, &c.; *de injuria sua propria absque tali causa* is a good plea. *Taylor v. Markham*, Yelv. 157. S. C. 1 Brownl. 215. S. C. Cro. Jac. 225.—*Hale v. Gerrard*, Latch. 221.

A replication *de injuria*, where it ought not to be used, is cured by verdict. *Banks v. Parker*, Hob. 76. *Collins v. Walker*, T. Raym. 50. But it was held to be bad on general demurrer. *Fursdon v. Weeks*, 3 Lev. 65. This case, however, was before the stat. 4 Ann. c. 16. which directs "that where any demurrer shall be joined and entered in any action or suit, in any court of record within this realm, the Judges shall proceed and give judgment, according as the very

- vant, there *de injuria sua propria* in some of the said cases with a traverse of the commandment, that being made material, is good ; and so you will agree all your books, *scil.* 14 H. 4. 32. 33 H. 6. 5. 44 E. 3. 18. 2 H. 5. 1. 10 H. 6. 3. 9. 39 H. 6. 32. 9 E. 4. 22. 16 E. 4. 4. 21 E. 4. 6. 28 E. 3. 98. 23 H. 6. 9. 21 E. 3. 41. 22 Ass. 42. 44 E. 3. 13. 45 E. 3. 7. 24 E. 3. 72. 22 Ass. 85. 33 H. 6. 29. 42 E. 3. 2. For the general plea *de injuria sua propria*, &c. is properly when the defendant's plea doth consist merely upon matter of (a) excuse, and of no matter of interest whatsoever ; *et dicitur de injuria sua propria*, &c. because the injury properly in this sense is to the person, or to (b) the reputation, as battery or imprisonment to the person ; or scandal to the reputation ; there, if the defendant excuse himself upon his own assault, or upon hue and cry levied, there, properly (c) *de injuria sua propria* generally is a good plea, for there the defendant's plea consists only upon matter of excuse (c). 3. It was resolved, that (d) when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, *the plaintiff ought to answer it, and shall not reply generally *de injuria sua propria*. The same law of an (e) authority given by the law ; as to view waste, &c (d). *Vide* 12 E. 4. 10. 9 Ed. 4. 31. 20 Ed. 4. 4. 42 Edw. 3. 2. 16 H. 7. 3.
- (a) Doct. pl. 115.
- (b) Doct. pl. 115. Cr. Eliz. 607.
- (c) Doct. pl. 115.
3. Resolution.
- (d) Doct. pl. 115. Cro. Car. 164.
- [* 67 b.]
- (e) Doct. pl. 115.
4. Resolution.
- Lastly, it was resolved, that in the case at bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single for parcel of the manor, demisable by copy, grant by copy, prescription of common, &c. and commandment would be all parcel of the issue (e). And so, by the rule of the whole Court, judgment was given against the plaintiff.

"right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, and other pleading, process, or course of proceedings whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect, might have heretofore been taken to be matter of substance, and not aided by the abovementioned statute, so as sufficient matter appear in the said pleadings upon which the Court may give judgment according to the very right of the cause." It seems therefore, very doubtful, whether advantage can be taken of *de-injuria sua propria* being improperly replied, in any other way than by special demurrer. In recent cases the objection seems to have been made uniformly by special demurrer.

(c) Accordingly, where, in an action for maliciously suing out a commission of bankruptcy, the defendant pleaded that the plain-

tiff being a trader, and being indebted to the defendant in the sum of 100l. he became bankrupt, wherefore the defendant sued out the commission, and the plaintiff replied *de injuria sua propria*, the Court held that the plea consisted of matter of excuse only; and, therefore, the replication was good. *O'Brien v. Saxon*, 2 Barn. and Cress. 909. S. C. 4 Dow and Ry. 579. Vid. Com. Dig. Pleader F. 18. Vin. Ab. *De Injuria sua propria*, A. *Jones v. Kitchen*, 1 Bos. and Pul. 76. (d) Acc. *Jones v. Kitchen*, 1 Bos. and Pull. 76. Com. Dig. Pleader F. 22, 23. But *de injuria sua propria* is a good replication when the defendant justifies by virtue of authority by the common law, as a constable by arrest for breaking of the peace, &c. and so it is ; and by the same reason when one justifies by an authority of an act of parliament ; for, being a general law, the statute can be no part of the issue. Per Holt, C. J. *Chance v. Weedon*, 2 Salk. 628. S. C. 1 Lord Raym. 700. S. C. 12 Mod. 580. Vid. Com. Dig. Pleader F. 23.

(e) Acc. *Cooper v. Monke*, Willes 52. *Bell v. Wardell*, ib. 202. Vide ante, note (a).

JOHN TROLLOP'S CASE,

[68 a.]

Mich. 6 Jacobi I.

An excommunication must be certified by the bishop, and not by his official or commissary, for the bishop is the immediate officer to the Court; and none shall certify an excommunication whereby any shall be disabled, but he to whom the Court may write to absolve the party excommunicated.

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A certificate directed to a particular Court, and in a particular manner, shall not be extended farther.

The certificate ought not to be general, but ought to shew the specialty of the cause for which the party is excommunicated.

The bishop must certify that which hath been sentenced in his own Court, and not in another Court.

If the bishop makes a certificate, and dies before it be received, it is a nullity; but his successor ought to certify.

*If the bishop is in *remotis agendis*, the vicar-general may certify an excommunication; a bishop may certify after election, and before consecration.*

Qu. If a pardon of all contempts, &c. discharges a person from an excommunication. S. C. Cro. Jac. 212.

LANCELOT RICHESON brought debt on a bond of 34*l.* by *Quo minus* in the Exchequer, against John Trollop, Esq. and upon issue and verdict had judgment against Trollop, upon which Trollop brought a writ of error against the said Richeson, who pleaded an excommunication, *et profert hic in curia literas Clementis Colnor, Legum Doctoris, reverendi in Christo patris, Tobie nuper Dunelm' Episcopi vic' in spiritualibus generalis, et officialis principalis legitime fulciti, sigillo consist' Dunelm', signat', viz. Clemens Colnor, &c. universis et singulis clericis et literatis quibuscunque per totam diocesin Dunelm' ubilibet constitut' salut'*: and recited that he did proceed against him for recusancy, and that *propter ipsius contumaciam in non comparendo, &c.* being lawfully cited and forewarned, he was excommunicated, *vobis igitur tenore præsentium mandamus quatenus præfat' Joh' Trollop' sic ut præmittitur per nos excommunicatum fuisse et esse, in ecclesia vestra parochial' diebus Dominicis, et aliis festivis, etc. publicè denunciatis, et cum effectu declaretis, etc.* and demanded judgment if he should be answered. The plaintiff said, that after the said excommenagement, the King by his general pardon in his Parliament, *anno 3*, did pardon all contempts &c. and all that he might pardon;

(a) 2 Brown.
301. Co. Lit.
134 a. 7 E. 4.
14.

(b) F.N.B. 62n.
(c) Fitz. Ex-
com. 11. Br.
Excom. 2, 19.
Br. Certificate
del evesque 1.

[* 68 b.]

(d) Br. Excom.
7. Br. Certifi-
cate del eves-
que 26.

(e) Br. Excom.
14. Fitz. Ex-
com. 16.

(f) Fitz. Ex-
com. 21. Br.
Excom. 5.

(g) Fitz. Ex-
com. 20. Co.
Lit. 134.

(h) Fitz. Ex-
com. 17. Br.
Excom. 25. Br.
Nonability 33.

(i) Reg. Orig.
67 b.

† 20 H. 6. 25 a.
Fitz. Excom.

12. Br. Excom.
3, 13. Bac. Ab.
Excom. C.

(k) Fitz. Ex-
com. 15. Co.
Lit. 131 a.

2 E. 4. 4 b.

(l) Br. Excom.
3. Fitz. Ex-
com. 12.

(m) Fitz. Ex-
com. 15.

Br. Excom. 15.
Br. Excom. 13.

(n) Br. Excom. 12.

and averred that neither the offence nor the person, &c. is ex-
cepted, &c. Upon which the defendant in the writ of error did
demur in law. And it was resolved by the Court, and the two
Chief Justices, that the said plea of excommunication was in-
sufficient for two causes. 1. Because the excommengement is
certified by the official or commissary of the bishop, where it
ought to be certified by the (a) bishop, who is the immediate
officer to the Court, for none shall certify an excommunication
whereby any shall be disabled, but he to whom the Court may
write to absolve him who was excommunicated, as the bishop,
guardian of the (b) spiritualties, &c. and therewith agree the
books in the point in 44 E. 3. Excommengement 23. 20 Ed. 3.
Excommengement 24. 41 Ass. p. 29. (c) 20 H. 6. 1 a. (d) 8 H.
6. 3. (e) 7 E. 4. 14 a. 14 (f) H. 4. 14 a. b. Vide 11 H. (4.)
6. 64 a. Hank. That it was so ordained by the (g) Parliament,
(h) 12 Ed. 4. 15 b. 16 a. F. N. B. 64. c. 65 a. But *the (i)
Chancellor of the University of Cambridge or Oxford may
certify an excommunication, for they do it by the King's charter,
Reg. F. N. B. 64. c. 2. (2.) If the bishop himself had cer-
tified it, yet it had been insufficient, for the direction ought to
be either to † this Court in particular, or at least, *universis*
sanctæ matris ecclesiæ filiis: but in the case at bar it is directed,
universis et singu' cler' et literal' quibuscunque per totam diæ-
cesin Dunelm' ubilibet constitut', by which particular direction
this Court is excluded, as a certificate of an excommunication
in the Chancery shall not serve in any other Court; neither
shall a (k) protection directed to one court, serve in another;
for always a certificate directed to a particular court, and in a
particular manner, shall not be extended farther; and there-
with agree (l) 20 H. 6. 25 a (m) 2 E. 4. 4. And it was objected,
that an excommunication is a spiritual judgment, and therefore
the temporal judges shall not dispute upon the manner of it.
To which it was answered and resolved, that the Judges of the
common law shall adjudge upon the manner, and (in some
cases) of the matter also of the certificate in case of excommu-
nication, as if the bishop himself be sued, and he pleads an ex-
communication (n) by himself or his commissary (who is as his
deputy) although it be for another cause than is then in ques-
tion, it shall not disable the plaintiff because he himself is party;
and therewith agree 16 E. 3. Excom. 5. 5 E. 2. Excom. 27.
5 E. 3. 8. 8 E. 3. 69. 18 E. 3. 58. 9 H. 7. 21 b. 10 H. 7.
9 a (A). Also if a prohibition be brought against a bishop and
(n) Br. Excom. 12. Swinb. 305. 3 H. 4. 3 b. Co. Lit. 134 a. Br. Nonabil. 55. Cawly 217.

(A) Lord Ellesmere, in his observations,
p. 5. observes, "The point in judgment was,
"whether excommunication pleaded in the
"Exchequer against the plaintiff in *Quo*
"minus under the seal of the official, and
"with a special direction of Omnibus Cle-
"ricis, &c. which could not comprehend
"the proper direction to the Court, be good
"or no. Yet the Chief Justice, in his report,
"starts aside to other matters; and sets it

"down as resolved, That the Judges of the
"common law shall adjudge upon the
"matter, and in some case upon the man-
"ner in the certificate of excommunication:
"adding withal, that the certificate of the
"bishop must comprehend in particular the
"cause of excommunication to the end
"that the Judges of the law may judge
"whether the ecclesiastical court hath conu-
"sance of the original cause. Now the

he shews forth the letters of the archbishop that the plaintiff is excommunicated *propter* (a) *diversas contumacias*, without shewing any cause in special of the excommunication, it shall not disable the plaintiff. The same law if any other be defendant in any action, and would disable the plaintiff by excommunication, he ought to shew the bishop's certificate, containing the specialty of the principal cause for which the plaintiff is excommunicated, to the end that the Judges of the law may know whether the Spiritual Court have consensuans of the original cause; and if the excommunication be against law, the Court ought to write to them to absolve the party; which they cannot do if the certificate be general; and if the bishop refuses it, his temporalities at the common law shall be seised, 28 Ed. 3. 97 a. 22 E. 4. 20 b. 20 Ed. 3. Excom. 9. 13 H. 7. 16 b. and in 14 H. 4. 14 b. Hanks there saith, that a (b) Doctor of the civil law told him, that no letter of certificate of excommunication (although it be of the bishop) should be allowed, if the principal cause be not contained in the writ; F. N. B. 64 f. The bishop ought to express the cause and suit against the plaintiff special in the certificate. *Vide* 3 H. 4. 3 b. mistaken in the report; for the opinion there is reformed in 14 H. 4. 14. as appears before, *vide* Fleta, lib. 6. 26. West. 2. cap. 43. Also the bishop ought to certify that which hath been sentenced in his own Court, and not in another Court. And therefore he cannot certify, that (c) another bishop hath certified to him, or that he hath seen a sentence of excommunication made by another bishop; *but the bishop may certify an excommengement made by his commissary or official, for *that* the Bishop's Court and his commissary doth is in his right, F. N. B. 65 a. 33 E. 3. Excom. 29. 9 H. 7. 21 b. 10 H. 7. 8 b.

If the Bishop makes a certificate, and (d) dies before it be received, it is nothing worth, but his successor ought to certify it, F. N. B. 65. 8 E. 2. Excom. 26. 14 E. 3. *ibid.* 8. But note, reader, that in some case the vicar general may certify an excommengement; but that is when the bishop is in (e) *remotis agendis*, which is as much as to say, *extra regnum* in the King's service: but the Court will be apprised of it by matter of record, *scil.* by writ out of the Chancery directed to them, and not by the surmise of the party, and then for necessity (which is always the law of time, for *necessitas est lex temporis*) the certificate of the vicar general shall be al-

(a) Fitz. Exc. 3.
28 E. 3. 97 a.
2 Bulstr. 139.
Salk. 293, 294.
Farr. 57, 117.
7 T. R. 153.

28 E. 3. 27 a.
(b) Fitz. Ex-
com. 21.

(c) F. N. B. 65 a.
Co. Lit. 134 a.

[* 69 a.]

(d) Co. Lit.
134 a. *Vide*
38 E. 3. 9 a. 12,
13. 9 E. 4. 46 b.
Bac. Ab. Ex-
com. C.

(e) Co. Lit.
134 a.
F. N. B. 62 a.

"matter in question could not draw in this discourse, but rather the desire of the reporter to intrude upon other men's profession, and to weaken the power of the ecclesiastical court, as if they were not absolute in themselves in jurisdictions naturally belonging to them, but subordinate to the Judges of the common law to be controuled in things that fall not within the level of the common law. For if the cause of excommunication be warranted by the canon law, and the common law shall judge the same insufficient, if now

"the bishop shall be compelled to absolve him, he shall do against the known justice of his own Court, which were most inconvenient."

Notwithstanding this censure, it would seem that by the common law the bishop ought to certify the cause of the excommunication. *Rex v. Fowler*, 1 Lord Raym. 619. *Queen v. Bishop of St. David's*, 3 Atk. 479. *Rex v. Layton*, 7 T. R. 153., and *vid. Rex v. Dugger*, 5 Barn. and Ald. 791. S. C. 1 Dow. and Ryl. 460.

(a) Co Lit. 134
a. F. N. B.
62 n.
(b) 2 Roll. Rep.
451. F. N. B.
62 n. Latch.
32.
† Palm. 464.

lowed, because no other can make it. And therewith agree 31 (41) Ed. 3. 10. (a) F. N. B. and after a bishop is elected, and before he is (b) consecrated, he may certify an excommen-
gement, for the power of the guardian of the spiritual-
ties † ceases after he is elected by the King's *Conge de eslire*:
and therefore for necessity he ought to certify it. F. N. B. 62.
N. and Register.

(c) Lit. s. 201.
Ante 62 b.
Co. Lit. 134 b.

And it is to be known, that when a plea of excommen-
gement is allowed, the writ shall not abate. but the entry is (c)
quod remaneat loquela sine die quousque, &c. 3 H. 6. 3. 3 Ed.
4. 8. 3 Ass. p. 12.

(d) Cr. Jac.
159, 212.

The point in law in the case at bar, if the certificate
had been good, was, if the general (d) pardon discharged
a man excommunicated of the excommunication or not; and
by the award of the Court the defendant was ruled to answer
over (B).

[Note, it appears by F. N. B. the Register and many other books, that
even after his election, &c. he is not to be named Bishop until the King
has given him the temporalities of the bishopric, for these only make
him a bishop; so that a bishop here in England is a mere temporal ma-
gistrate by the common law. *Vide* 12 Co. 8, 9.]—*Note to former Edi-
tion.*

(a) It seems the general pardon would
have discharged the excommunication, *Rex*
and *Codrington v. Redman*, Cro. Car. 199.
S. C. W. Jones, 227. *Bishop of Exeter v.*
Starr, 2 Lev. 36. Gib. Cod. 1110. Burn's
Ecclesiastical Law, Vol. II. p. 261.

Now by stat. 53 Geo. 3. c. 127. s. 1. ex-
communication, together with all proceed-
ings following thereupon, (except in certain
cases in the act specified,) shall be discon-
tinued. By s. 2. the Ecclesiastical Courts
may excommunicate in definitive sentences
or interlocutory degrees having the force

and effect of definitive sentences, such sen-
tences or decrees being pronounced as spi-
ritual censures for offences of ecclesiastical
cognizance. By s. 3. no person so pro-
nounced excommunicate shall incur any
civil penalty or incapacity whatever, save
such imprisonment not exceeding six months
as the Ecclesiastical Court shall direct.

Vid. upon the subject of Excommunica-
tion, Bac. Ab. Excom. Com. Dig. Excom.
Vin. Ab. Excom. Burn's Ecclesiastical Law,
Vol. II. p. 242. tit. Excommunication.

WHITLOCK'S CASE,

[69 b.]

Hil. 6 Jac. 1.

Which began Mich. 6 Jacobi 1. Rot. 1316.

In the Common Pleas.

Under a power to make a lease or leases, grant or grants, &c. as well in possession as in reversion of certain tenements or any parcel thereof, &c. with a proviso, that such lease or leases, grant or grants, shall not exceed the number of three lives at most, or twenty-one years, and so as the ancient and accustomed annual rent should be reserved : the premises being at the time of the creation of the power demised to one B. for life : a lease may be made for ninety-nine years determinable on two lives to commence after the death or determination of the estate of B. : and a reservation of an annual rent to the lessor who was tenant for life, his heirs and assigns, and to such person and persons to whom the premises demised after the death of the lessor should belong during the said term, is good.

CHAPPEL
v.
WHITLOCK.
Pt. VIII.—69b.

Under a power to lease for three lives, a lease for ninety-nine years determinable on three lives is not good.

The most clear and sure way is to reserve rent during the term without an express reservation to any person. S. C. 1 Brownl. 169. Vid. the entry, Co. Ent. 600. nu. 15.

IN a replevin between John Chappel, plaintiff, and William Whitlock defendant, for taking of a gelding in Rings Ash, in the county of Devon, in a place called Cunny park ; the defendant avowed the taking in the place where, &c. as in his freehold, for damage feasant. The plaintiff in bar of the avowry pleaded, that one William Whitlock the elder was seised of a messuage, 20 acres of land, 12 acres of wood, and 20 acres of heath, in Ring's-ash aforesaid in fee, whereof the place where is parcel, and demised the said tenements to one John Bullhead for his life, by force whereof he was seised for life, the reversion expectant to the said William Whitlock the elder ; and the said William Whitlock the elder, 11 Martii, 18 Eliz. by his indenture tripartite, in consideration of a marriage to be solemnized between William Whitlock the

2 Roll. Rep.
274. 2 Bulstr.
273. Touch.
269. O. Bridgm.
101.

younger, and Margaret, daughter of John Bolter, covenanted and agreed by the said indentures, that the said William Whitlock the elder, before the feast of the birth of Christ next ensuing, would assure and convey to Leonard Yeo, and Anthony Whitlock, and their heirs, the tenements aforesaid, to the uses, intents, and purposes expressed and declared in the said indentures, and to no other uses or intents, viz. till the said marriage to the use of the said William Whitlock, the elder, and his heirs; and after the said marriage, to the use of William Whitlock the elder for his life, without impeachment of waste, and afterwards to the use of the said William Whitlock, the younger and the heirs of his body,

[* 70 a.]

2 Roll. Rep.
274. 2 Roll.
260.

Postea 71 a.

2 Roll. Rep.
174. 2 Roll
260.

1 Co. 139 a.
Postea 71.

and afterwards to *the use of J. Whitlock and his heirs: *Et per eund' indenturam ulterius provisum, concessum et agratum fuit, quod liceret et licitum foret præd' Will' Whitlock, sen. ad aliquod temp' extunc facere dimissionem, (Anglice lease) sive dimissiones, concessionem sive concessiones, tam in possessione quam in reversione de tenementis præd' cum pertin', unde, &c. inter alia, sive de aliqua parte inde. Proviso semper quod præd' dimissio sive dimissiones, concessio sive concessiones non excederent super numerum trium vitarum ad majus vel viginti et unius annorum, et ita quod super quamlibet talem dimissionem et dimissiones, concessionem et concessiones, maxime antiq' et consuet' annual' reddit', heriot' et servitia sive plus redderentur et reservarentur, solubil' duran' dict' dimissione sive dimissionibus, concessione sive concessionibus:* and that the said Leonard and Anthony, and their heirs, should stand seised, &c. to the use of every such fermor, &c. and afterwards 18 Maii, 18 Eliz. the said William the younger, and Margaret, intermarried; and afterwards, Trin. 18 Eliz. William Whitlock the elder levied a fine of the tenements aforesaid, according to the same indentures, to the uses therein contained, by force whereof, and of the statute of Uses, the said William Whitlock the elder was seised of the reversion of the said tenements, &c. for his life, the remainder over according to the said indentures. And the said William Whitlock the elder so seised, 1 Sept. 31 Eliz. *dimisit cuidam Christian' Hearne tenem' præd' cum pertin' unde, &c. inter alia habend' et occup' eidem Christianæ et assignat' suis pro term' 99 annor' plenarie complend' et finend', si præd' Christiana et quid' Petr' Rattenbury, sive eorum alter, tam diu vivere contingeret:* the same term to commence after the death or determination of the estate of the said John Bullhead, *reddendo et solvendo pro inde annuatim post inceptionem dictæ dimissionis, præfato Will' Whitlock, sen. hæred' et assign' suis et tali personæ et personis quib' hæreditament' præmissorum post mortem præd' Will' Whitlock, sen. de jure spectaret seu pertineret durante dicto termino 14s. ad quatuor maxime usualia festa annuatim solvendo, &c.* And the plaintiff justified under the said lease, and averred the life of the said Peter Rattenbury, and that the most ancient and accustomed yearly rents, heriot, and services, &c. were reserved, &c. upon which the avowant did demur in law. And in this case two questions were moved,—1. Whether Wil-

liam Whitlock the elder had pursued his authority or not, in making the said lease for 99 years, determinable on the said two lives? 2. Whether the said reservation of the rent was according to the said *Ita quod*, &c. And as to the first it was objected, that the authority was distinct, *sc.* either to make a lease not exceeding the number of three lives, or for twenty-one years, by which *it appears that the intention was either to make a lease for three lives, &c. or if he would make a lease for years, that it ought to be for twenty-one years; but in the case at bar, the lease is not for three lives, &c. nor for twenty-one years, but for ninety-nine years, if two or either of them shall so long live, and so his authority not pursued. And if (a) one hath power to make a lease for three lives, he cannot make a lease for ninety-nine years determinable upon three lives, &c. *quod fuit concessum per totam curiam* (A). But it was answered and resolved by the Court, that in the case at bar the lease was good, and the power which the lessor had was well pursued: for the proviso of creation of his power to make leases is in the beginning absolute, affirmative, and indefinite, *scil.* to make a lease or leases, grant

[* 70 b.]

(a) 2 Roll. 250.
2 Roll. Rep.
274.
2 Roll. 260.
Touch. 269.

(A) In *Rattle v. Popham*, Strange 992. S.C. Cunn. 102. it was decided, according to the resolution in *Whitlock's case*, that a power to grant a life estate is not well executed by a lease for ninety-nine years determinable on a life. In *Zouch v. Woolston*, 3 Burr. 1147. Lord Mansfield said, that in the case of *Rattle v. Popham*, the Court thought themselves bound by *Whitlock's case*, and held the lease not to be warranted by the power. The widow brought her bill in the Court of Chancery; and Lord Talbot, arguing from the same premises the power and the lease without any other circumstance, held the lease to be warranted by the power. He said it was not a defective but a blundering execution; and he decreed the defendant to pay all the costs, both at law and in equity. In *Shannon v. Broad street*, 1 Scho. and Lef. 71. Lord Redesdale observed, that if Lord Mansfield found fault with the decision in *Rattle v. Popham*, as he was represented to have done, he thought with deference there was no ground for the remark. From a MS. note of the case in App. No. 20. to Sugden on Powers, it appears, that Lord Talbot admitted that the power was not well executed at law: but relief was given against the defective execution on the general rule of equity. Vid. Sugden on Powers 452. 3d ed. In *Roe v. Prideaux*, 10 East. 158. where a power authorized a lease for any number of years not exceeding twenty-one years, or for the life or lives of any two or three person or persons so as no greater estate than for three lives be at any one time

in being in any part of the premises, the Court held that the power authorised a lease for years but not a lease for years determinable on lives. The Court relied upon *Whitlock's case*, and treated the case of *Rattle and Popham* as well decided at law.

"The result of the authorities (Sugden "on Powers 453. 3d ed.) appears to be, that "subject to the distinction taken in *Whitlock's case*, where a freehold interest is "authorized to be appointed under a power, a different species of estate although "less valuable, as a term for ninety-nine "years determinable with the life, cannot at "law be granted. But that in equity such "an execution will be supported because "less than the power is effected, and it "clearly appears how much less; if the "appointees should outlive the ninety-nine "years, the estate as to the residue of his "life will be undisposed of, and will go over "to the remainderman, or other person "entitled."

In *Isherwood v. Oldknow*, 3M. and S. 382. the Court held that when a power authorized a lease for twenty-one years, without saying for any term not exceeding twenty-one years, a lease may be made for fourteen years, or for any number of years less than twenty-one.

The covenants entered into by the lessee with the donee of the power, his heirs and assigns, will under stat 32 H. 8. c. 34. enure to the remainderman, who may maintain an action on them. *Isherwood v. Oldknow*, *ib. sup.*

Difference between a particular power affirmative, and a general power restrained with a negative.

Cro. Car. 289.
[* 71 a.]

(a) Hob. 130.
2 Roll. 447,
450. Co. Litt.
47 a. 143 b.
213 a. Cro.
Car. 289.
† Ante 70 a.
1 Co. 139 a.
Plowd. 132.
(b) Moor. 383.

(c) Ante 70 a.
O. Bridgm. 164.

or grants, &c. as well in possession as in reversion of the tenements, or any parcel thereof, &c. which is without any limitation. Then the proviso of correction is added, *scil.* so that such lease or leases, grant or grants, shall not exceed the number of three lives at most, or twenty-one years, which clause is negative, and qualifies the generality of the first proviso: so that the power by the first is general, and by the second the lease ought not to exceed three lives, &c. And when the lease is made for ninety-nine years determinable upon two lives, it doth not exceed the number of three lives, although in truth it is not a lease for lives. 2. The power is to make leases as well in possession as reversion, with the limitation aforesaid; and a lease for three lives cannot be made in reversion, but a lease for years determinable upon lives may, and the lessor himself had but a reversion expectant on an estate for life at the time of the creation of the said power: so that the intention of the parties was (not) to make a lease for years absolutely for twenty-one years; but any term of years determinable upon three lives, &c. which is in equipage with twenty-one years, he well might. And the difference was taken and agreed between a particular power affirmative, and a general power restrained with a negative; for it is true, that if one hath power to make a lease for three lives, or twenty-one years, he cannot make a lease for ninety-nine, if three shall so long live, &c. but if he has power to make any lease or grant, provided such lease or grant shall not exceed the number of three lives, or twenty-one years, there he may make a lease for ninety-nine years, if three shall so long live, for that doth not exceed the number of three lives, but in truth is less; for every term for years, which is but a chattel, is less, in estimation of law, than an estate for life, which is a freehold. As to the second point, it was objected, that the said reservation was such, that it was not payable during the said lease, as it ought, but only during the life of the lessor; for he having but an estate for life, reserved the rent to him and his heirs, and his heirs cannot have it, and the *latter words, *scil.* to such person and persons who have the inheritance of the premises, &c. are merely void; for no rent can be (a) reserved but to the lessor, donor, or feoffor, and his heirs, who are privies in blood, and not to any who is privy in estate, as to him in reservation, remainder, &c. But it was resolved, that the † reversion in the case at bar is good. For the said lease hath not its essence from the estate of the lessor, which he hath for life; but the lease hath its essence out of the said fine, and in construction of law (b) precedes the estate for life and all the remainders; for after the lease made, it is as much as if the use had been limited originally to the lessee for the said term, and then the other limitations in construction of law follow it: and that is the reason that the usual clause in such indentures is, that the conusees and (c) their heirs shall stand seised to the use of such lessees, &c. So that the lessee, in the case at bar, derives his estate out of

the estate which passed by the fine. Then, when the lessor reserves rent to him and his heirs, it is good; for that by construction of law precedes the limitations of the uses; and then it being well reserved, it is well transferred to every one to whom any use is limited (b). So if the reservation be to the lessor, and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good; for the law will distribute it to every one to whom any limitation of the use shall be made. And in such case no rent is reserved to a stranger; for the reservation precedes the limitation of the uses to strangers. But it was agreed, that the most clear and sure way was to (a) reserve rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person. But it was resolved, that all the said three several ways were good enough and effectual in law.

(a) 1 Inst. 47 a.
Hardres 90.
1 Jones 309.
Plowd. 171.
2 Sand. 369.
21 H. 7. 25 b.
Goldsb. 148.

(b) Acc. *Holley v. Scott*, Loft. 316. *Campbell v. Leach*, Anbl. 740.—Where the power is "to lease with or without fine," and ren-

dering such rent and services as the donee should think fit, no rent need be reserved. *Talbot v. Tipper*, Skinn. 427.

GRENELEY'S CASE,

[71 b.]

Pasch. 7 Jacobi 1

Feoffment to husband and wife, and to the heirs of their two bodies. The husband makes a feoffment in fee, and dies: afterwards the wife, before any entry by her, dies. Resolved, 1. At the common law this feoffment was a discontinuance to the issue. 2. The husband and wife had a joint and undivided estate tail; and this joint estate of the husband and wife is within the words of 32 H. 8. cap. 28., by which statute no fine, feoffment, or other act, &c. by the husband only, of any manors, lands, &c. of the inheritance or freehold of his wife during the coverture, &c. shall make any discontinuance, or be prejudicial, &c. to the wife or her heirs, or to such as have right, &c. by the death of such wife, &c.; but that they may lawfully enter, &c. 3. The issue being heir of their two bodies may enter. The act 32 H. 8. extends only to discontinuances.

*In all cases where the wife might have a *cui in vita* at common law, she shall enter by force of this statute; and when the issue cannot have *sur cui in vita*, or *Formedon*, he shall not enter within the remedy of this statute.* S. C. 4 Brownl. 131.

GRENELEY
v.
GRENELEY.
Pt. VIII.—71 b.

IN an *Ejectione firmæ* between Owen Greneley, plaintiff, and Philip Greneley and others, defendants, on a demise made by Stephen Greneley of three acres of land in St. Super Arrow in com' Hereford', and on not guilty pleaded, the jury gave a special verdict to this effect: William Woodhouse and John Badland were seised of the said three acres in fee, and 20 Oct. 38 Hen. 8. did thereof enfeoff Philip Greneley the elder, and Isabel his wife, to have and to hold to the said Philip and Isabel, and to the heirs of their two bodies lawfully begotten: the said Philip the elder, 1 Dec. 17 Eliz. did enfeoff Philip Greneley the younger, of the said three acres in fee; and afterwards, 20 Eliz. Philip the elder died, and Isabel survived him; and afterwards the said Isabel, before any entry made by her, viz. 26 Eliz. died; and the said Stephen Greneley, the lessor of the plaintiff, was heir of their two bodies begotten, &c. And the only question in this case was, whether the said feoffment of Philip the elder to Philip the younger had tolled the entry of the said Stephen, or that the entry of Stephen was lawful or not.

1. Resolution.

(a) 1 Roll. 634.
Co.Lit. 326 a. b.
Plowd. 112 b.

1. It was resolved, that at the common law this (a) feoffment was a discontinuance to the issue; for the issue ought to claim as heir of their two bodies individually, and as heir to one only he cannot inherit, and by consequence cannot enter; for his entry ought to ensue his title and his action; and the *Formedon* in the descender in such case is, *Quod C. dedit D. & E. uxori ejus & hæredibus de corporibus ipsorum D. et E. excurrentibus, et quod post mortem prædict' D. et E. præfato K. filio et hæred' eorundem D. et E. descendere debet per formam donationis prædict' &c. Regist' Orig' 238 b.* By which it appears, that in this

[* 72 a.]

**Formedon* he ought to make himself heir to both, and not to the survivor: so if the said donees had been disseised, and a descent cast, and afterwards the father died, and before entry the mother died, the entry of the issue is not congeable, because he ought to claim as heir of both their bodies; and as heir to the father he is bound by the descent, as his father himself was; and as heir to his mother only he cannot enter, for he hath not any such title. *Vide* 35 Hen. 6. 45 b. in assise: but if the mother in such case had entered, and re-continued the estate tail, then the discontinuance was purged, and utterly removed, and the estate-tail actually revested in the wife; which after her death descends to the issue. 2. It was resolved, that although the husband and wife had a (a) joint and undivided estate-tail (A), and that the words of 32 Hen. 8. cap. 28. are, "That no fine, feoffment, or other act or acts hereafter to be made, suffered, or done by the husband only, of any manors, lands, tenements, or hereditaments, being the inheritance or freehold of his wife, during the

2. Resolution.

(a) Co.Lit. 326a.

(A) "Though a devise to A. and B., who are strangers to, and have no connection with each other, creates a joint-tenancy, the conveyance by one of whom severs the joint-tenancy, and passes a moiety; yet it has been settled for ages, that when the devise is to the husband and wife, they

"take by entireties; and the husband alone cannot by his own conveyance, without joining his wife, divest the estate of the wife." Per Lord Kenyon, *Doe v. Parrot*, 5 T. R. 654. Vid. *Green v. King*, 2 Black. Rep. 1211. *Back v. Andrews*, 2 Vern. 120.

"coverture between them, &c." That this joint-estate was within these words "the inheritance (a) or freehold of his wife;" for she hath a freehold and inheritance in the land, although she hath not the sole freehold or inheritance. So hath it been always taken upon the stat. of Westm. 2. (b) cap. 3. *In casu quando vir amiserit per defult' tant'. quod fuit jus uxoris suæ, &c. propter quod Rex statuit, quod mulier post mortem viri sui habeat recuperare per breve de cui in vita, &c.* that a joint-estate to husband and wife hath been always taken within these words, *jus uxor'*; and yet *non fuit solum aut unicum* (c) *jus uxor'*; and according to this resolution in the principal case was it adjudged in (d) Beaumont's case; and therewith agree (e) 3 Eliz. Dyer 191 b. Hawtry's case. 3. It was resolved, that by the said act (f) the entry of the issue in tail was lawful in the case at bar; for the words of the act go farther—"shall in anywise be or make any discontinuance, or be prejudicial or hurtful to the said wife, or to her heirs, or to such as shall have right, title, or interest to the same, by the death of such wife or wives: but that the same wife or her heirs, and such other to whom such right shall appertain after her decease, shall or may then lawfully enter into all such manors, lands, tenements, and hereditaments, according to their rights and titles therein." So that if the issue in tail shall not be within these words, "her heirs," because he is heir to both, *sc.* to father and mother; yet, without question, he is within these words, "or to such as have right by the death of such wife." And in this case a difference was taken and agreed between a discontinuance which implies a wrong, and a lawful bar, which implies a right: and therefore if lands are given to husband and wife, and to the heirs of their two bodies begotten, and the (g) husband levies a fine with proclamations, *or commits high (h) treason, and dies, and the wife before or after entry dies, there the issue is barred; and the conusee or the King hath right to the land, because the issue cannot claim as heir to both; and therewith agrees 18 Eliz. 351 b. adjudged. *Vide* 5 Hen. 7. 32 (i) Colt's assize. And it was resolved, that the stat. of 32 Hen. 8. extends only to discontinuances, although the act hath general words, "or be prejudicial or hurtful to the wife or her heirs, &c." But the conclusion is, "shall lawfully enter, &c. according to their rights and titles therein," which they cannot do when they are barred, and have no right, title, or interest; and this statute gives advantage to the wife, &c. so long as she hath right; but it doth not extend to take away a future bar, although the statute gives entry without limitation of any time: but the entry ought to wait upon the right. And therefore if the husband levies a fine with proclamations to another, and dies, now the wife (k) may enter by force of the statute. For

(a) Cro. Car. 22.

(b) 2 Inst. 342, 343.

(c) 2 Inst. 343. Cro. Car. 22.

3. Resolution.

(d) 9 Co. 138 b. 139.

Cro. Car. 476.

1 Jones 393.

(e) Dyer 191.

pl. 22.

Hob. 71, 255,

256.

(f) Co. Lit.

326 a.

1 Brownl. 131.

Difference between a discontinuance, which implies a wrong, and a lawful bar, which implies a right.

[* 72 b.]

(g) 1 Co. 87 b.

9 Co. 139 a.

Dyer 351. pl. 24.

2 Inst. 681.

Hob. 257, 333.

Moor 147.

1 Brownl. 140.

1 Leon. 84, 157.

Dall. in Kelw.

205. pl. 7.

Dall. in Ash.

pl. 16. 1 And.

39. pl. 101.

Godb. 312.

N. Bendl. 225.

pl. 257. Bendl.

in Ash. pl. 27.

Bendl. in Kelw.

Cr. Car. 478.

213. pl. 27. 1 Roll. Rep. 424. 2 Roll. Rep. 321. Moor 28. pl. 90, 114. pl. 256. 1 Jones 40. Lit. Rep. 291. (A) 1 Co. 139 a. 140 a. Dyer 332. pl. 227. Hob. 257, 346. 1 And. 39. pl. 102. Godb. 312. Raym. 6, 7. 2 Roll. Rep. 321. Mo. 114. pl. 256. Moor 147. 1 Brownl. 139, 140. Cro. Car. 478. 1 Jones 40. (i) Dyer 122. pl. 22. (A) 1 Roll. Rep. 91, 92, 160. 9 Co. 140 b. 10 Co. 49 b. Co. Lit. 326 a. Dyer 72. pl. 3. Cro. Car. 201.

(a) 2 Co. 93 a.
10 Co. 49 b. 99 a.
Dy. 224. pl. 28.
Palm. 235.
Goldsb. 148.
3 Leon. 221.
Moor 93.
2 Roll. Rep. 409.
3 Inst. 216.
Cro. Jac. 333.

If the husband tenant in tail, the remainder to the wife in tail, makes a feoffment in fee, and dies without issue, the wife may enter: otherwise if he suffers a common recovery.

(b) 9 Co. 140 a.
Co. Lit. 19 a.

In all cases where the wife might have a *cui in vita* at common law, she shall enter by force of this statute: and [* 73 a.] when the issue cannot have *sur cui in vita*, or *Formedon*, he

Husband aliens; the wife is divorced *causa præcontractus* she may enter during the husband's life.

(c) Moor 58.
Co. Lit. 326 a.
(d) Co. Lit. 326 a. Moor 58.

yet the fine is not any bar to her; but her right remains, which she may recontinue by entry: but if she surceases her time, (a) and five years pass without entry, &c. now by force of the fine with proclamations, and five years passed after the death of her husband, she is barred of her right, and by consequence she cannot enter; and the statute speaks of fine only, and not of fine with proclamations; and therewith agrees the 6 E. 6. Dy. 72 b. And it was resolved, that if the husband be tenant in tail, the remainder to the wife in tail, that if the husband makes a feoffment in fee, and dies without issue, the wife may enter, because it was the inheritance of the wife; but if the husband suffers a common recovery, and dies without issue, there the wife is barred, and cannot enter by force of this statute: but this statute was made to relieve him who has right, and to suppress wrong, and to advance right without any respect to the warranty of the discontinuance, if he hath any. And if (b) before the statute *De Donis conditionalibus*, lands had been given to husband and wife, and the heirs of their two bodies begotten, and they have issue, and the husband *post prolem suscitatum* aliens, and dies before the statute, and the wife survives and dies after the statute, the issue shall have a *Formedon*: for notwithstanding the said alienation, a right remains, so much as the husband only aliens, which right is entailed by the statute; and before the statute, the issue in such case might have a *Sur cui in vita*, and claim as heir of the body of both; for the feoffment was no bar, but a discontinuance: and therewith agrees 21 Ed. 3. 45 a. b. 12 Hen. 4. 7. And in all cases where the wife might have a *Cui in vita* at common law, she shall enter by force of this statute of 32 Hen. 8. and where the issue cannot have *Sur cui in vita*, or *Formedon*, there he shall not enter within the remedy of this statute. And therefore if the husband has issue, and aliens, and the wife dies, the issue shall not enter (c) during *the life of the husband, because at the common law he had no remedy to recover the land during the husband's life; and the words of the act are, "according to their right and title therein."

But if the husband aliens, and afterwards the wife (d) is divorced *causa præcontractus*, or any other divorce which dissolves the marriage *a vinculo matrimonii*, there the wife during the husband's life may enter; for the words of the act are, no fine, feoffment, &c. during the coverture between them. And although afterwards the husband and wife are divorced, yet the feoffment was made during the coverture between them. And although the statute saith, "but that the same wife, &c." that is to be intended of her who was his wife at the time of the alienation; for when the husband dies, she is not then his wife, but she is called wife to describe the person only who shall enter; and it is not said in the statute that the wife shall enter after the death of her husband, but generally that she shall enter "according to their right and title;" be it in the life of the husband after a divorce *a vinculo matrimonii*, or after his death.

THE LORD STAFFORD'S CASE.

Trin. 7 Jac. 1:

Estate-tail of the gift of the crown to S. and U. his wife, and the heirs of the body of S. T. levied a fine to S. and U. his wife, *come ceo*, and to the heirs of S. by which fine S. and U. rendered the lands to T. for twenty-five years. S. died; U. held in by survivorship, and the remainder of the said estate-tail descended to S. the son. Afterwards the Queen by letters patent reciting the former estate, and the reversion in the crown expectant, granted the reversion in tail to T., and further willed and declared that on the payment of a certain sum of money by T. he should have the said reversion in fee. T. performed the condition; afterwards S. the son died: and E. his son upon whom the said remainder descended, levied a fine with proclamations to C. and others. Held, the grant to T. is good; and on performance of the condition, T. gained the reversion of the fee-simple out of the Queen: and the issue of E. is barred by the fine with proclamations.

MALYM
v.
TULLY.
Pt. VIII.—73 b.

A grant with a condition precedent may be made as well of things which be in grant, as of land which lies in livery, and may be annexed as well to an estate-tail which cannot be merged, as to an estate for life or years, which may be merged by the accession of a greater estate: but such an increase of an estate by force of a condition precedent ought to have four incidents. 1. It ought to have a particular estate. 2. Such particular estate ought to continue in the lessee or grantee till the increase happens. 3. It ought to vest at the time the contingency happens, or otherwise it shall never vest. 4. The particular estate and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time. If the reversion in fee had in the principal case remained in the crown, the fine levied by E. would not have barred the issue, but such issue might have entered. S. C. 2 Brownl. 249. Vid. the entry, Co. Entr. 577. nu. 6.

*BETWEEN Thomas Malym, plaintiff, and Thomas Tully, defendant, in a replevin, which began in the Common Pleas, Trin. 6 Jacobi, Rot. 2341. Upon the pleading the parties demurred in law, and upon the whole record the case was such: Queen Mary was seised of a park called Estwood Park, within the manor of Thornbury, in the county of Gloucester, in fee; and by her letters patent, 10 Julii, anno regni sui 2. granted the said park to Henry Lord Stafford, and Ursula his wife, and to the heirs of the body of Henry Lord Stafford, by force whereof the Lord Stafford and Ursula his wife were seised thereof accordingly, the reversion over expectant to the said Queen Mary, her heirs, and successors, which rever-

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sion of the fee-simple by the death of Queen Mary, descended to Queen Elizabeth. Hil. 3 Eliz. Tyndal levied a fine to the Lord Stafford, and Ursula his wife, *come ceo*, and to the heirs of the Lord Stafford, of the said park, by which fine the Lord Stafford and his wife rendered it to Tyndal for 25 years: and afterwards Henry Lord Stafford, ultimo Jun. 7 Eliz. died, and Ursula survived him, and held in by survivorship, and the remainder of the said estate-tail descended to Henry Lord Stafford the son: and afterwards Queen Eliz. by her letters patent, 10 Jul. 7 Eliz. reciting the former estate, the reversion and reversions thereof to the said Queen Eliz. her heirs and successors expectant, the said Queen Eliz. by the said letters patent, and for the sum of 53*l.* 18*s.* paid by Thomas Tyndal, Gent. did grant to the said Thom. Tyndal *reversionem præd' parci, &c. habend' et tenend' sibi et hæred' de corpore suo legitime procreatis: et ulterius prædicta* nuper Regina Elizabetha voluit et declaravit per eandem literas patentes, quod si præfat' Thomas Tyndal hæredes et assignati sui ad aliquod tempus imposterum solverent seu solvi faceret, aut eorum aliquis solveret seu solvi faceret, ad receptum Scaccar' præd' nuper Reginae hæred' vel successor' suor' ad usum ipsius nuper Reginae hæred' vel successor' suor', summam viginti solidor' legalis monetae Angliæ pro præmissis, ultra præd' summam 53*l.* 18*s.* tunc eadem nuper Regina Elizabetha de ampliori gratia sua speciali, ac ex certa scientia et mero motu suis voluit et per eandem literas suas patentes pro se hæredibus et successoribus suis concessit et declaravit quod extunc idem Tho. Tyndal et hæredes sui haberent et tenerent, ac habere, tenere, et gaudere valerent et possent, sibi et hæred' suis imperpetuum virtute earundem literarum patentium suar' præd' reversionem præd' parci cum pertinent' inter alia: habend' tenend' et gaudend', ea omnia et singula præmissa cum pertinent' præfat' Tho. Tyndal hæredibus et assignat' suis: by force whereof the said Thomas Tyndal was seised of the said reversion in tail, and he being thereof so seised, the reversion over to the Queen as aforesaid, the said Tho. Tyndal, 23 Feb. 8. Eliz. at the receipt of the Exchequer at Westminster, paid to Thomas Gardiner then one of the Tellers of the Exchequer, to the use of the said Queen, the sum of 20*s.* for the said park, above the said sum of 53*l.* 18*s.* which 20*s.* were then received, *prout per record' receptionis inde in curia Scaccarii domini Regis nunc apud Westm' præd' remanen' plene liquet et apparet*, by force whereof he was seised of the said reversion in fee expectant on his estate-tail: and afterwards Henry Lord Stafford, 8 Eliz. died: after whose death the said remainder descended to Edward Lord Stafford his son, who, Pasch. 8 Eliz. levied a fine to Clark, and others, of the said park, with proclamations, and afterwards the said Ursula, 10 Eliz. died, and afterwards Edward Lord Stafford died, and Edward Lord Stafford that now is, his son and heir, pretending that the said reversion in fee did not accrue to Tho. Tyndal by the payment of the said 20*s.* but remained in the crown, by the said Thomas Malym distrained the cattle of Tully the plaintiff, in the said park, who claimed*

[* 74 a.]

under the said fine; and to enforce the letters patent of Queen Eliz. the statute of confirmation of letters patent made (a) 18 Eliz. was pleaded; which was not pertinent to this case: but the principal point of this case was, whether by the payment of the said 20s. the said Tho Tyndal had gained the reversion of the fee-simple, out of Queen Eliz. For if no reversion remained in the Queen, then the (b) fine with proclamations barred the Lord Stafford that now is, who claimed as issue in tail; and if the reversion remained in her at the time of the fine, then the fine levied by Edward Lord Stafford the father did not bar him.

(a) 18 Eliz.
cap. 2.

(b) Raym. 271.
34 and 35 H. 8.
cap. 20.

*And this case was very well argued by the Serjeants, *scil.* Hutton, Nichols, Harris the younger, and Houghton, and afterwards this term the case was argued by all the Justices of the Bench, *scil.* Coke Chief Justice, Walmesley, Warburton, Daniel, and Forster. And two objections were made against the substance of the grant, and two against the form of the grant. The objections against the substance were, 1. That such condition cannot be annexed to a thing which lies in grant but to a thing which lies in livery; and therefore it was said that rents, commons, advowsons, reversions, &c. cannot be granted for life or years, with condition to have fee, but only land which lies in livery, for the increase of such future estate rather takes effect by livery, than by grant; for without livery such future estate will not pass in case of land, and it ought to pass *ab initio* by the first livery; and a man cannot grant a rent *in esse* or a common, or advowson, or (c) a reversion, or any thing which lies in grant to begin *in futuro*, as from Michaelmas next following, or after such an act done, &c. And all the books in the law which speak of such condition for increase of an estate, put the case always of land, to which livery is requisite, 31 Edw. 1. Voucher 285. 31 E. 1. *Feoffments et Faits*, 119. 2 E. 2. *Quid juris clamet* 38. 12 E. 2. Voucher 265. 7 E. 3. 10. 10 E. 3. 40, 55. 10 Ass. p. 15 & 19. 12 Ass. p. 5. 32 E. 3. Garr. 30. 43 E. 3. 35. 43 Ass. p. 41. 44 E. 3. Attaint 22. 50 E. 3. 27. 6 R. 2. *Quid juris clamet* 20. 27 H. 6, 7. Plow. Com. Saye's case, 272. Plow. Com. the Lord Lovel's case, 487. The second objection was, that such condition which increases an estate, ought always to merge the first estate upon the increase, and make all but as one estate and one grant, and therefore it ought to be annexed to an estate for years or life, which so may merge on the performance of the condition, that all shall be but one estate by one grant, and not several and divided estates; and therefore in all the said books such condition is always annexed to an estate which may merge; but in the case at bar the condition is annexed to an estate-tail, which cannot merge (d) by the access of the fee-simple to it; and such condition was never annexed to an estate-tail, in any book or precedent which can be shewed. As to the objections to the form of the grant, the first was, that after the Queen had granted the reversion to Thomas Tyndal, and to the heirs of his body, she now upon the *Contingit* grants to him *prædictam reversionem* to him and

[* 74 b.]

Objections
made to the
substance of
the grant.

(c) Plow. 155 b.
156 a. 197 a.
Cro. El. 152.
1 Leon. 171.
Co. Lit. 217 b.

(d) a Co. 61 a.
2 Bl. Com. 177.

Objections to
the form of the
grant.

[*75 a.]

A grant with a condition precedent may be made as well of things which lie in grant, as of land which lies in livery; and may be annexed as well to an estate tail which cannot be merged, as to an estate for life or years, which may be merged by the accession of a greater estate: but such an increase of an estate by force of a condition precedent ought to have four incidents. 1. It ought to have a particular estate. 2. Such particular estate ought to continue in the lessee or grantee, till the increase happens. 3. It ought to vest at the time the contingency happens, or otherwise it shall never vest. 4. The particular estate and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time. † Co. Lit. 217 b. ‡ 2 Co. 61 a. § 2 Brownl. 251. || Plowd. 485 a. 489 a. 2 Co. 71. Co. Lit. 217 b. Such foundation ought not to be revocable at the will of the grantor or lessor. ¶ Touch. 129. Fearné Cont. Term. 279. 7th edit. Cruise, Vol. 2. 314. Com. Dig. Cond. B. 2.

his heirs: in which it was said, the Queen was deceived in her grant, for *prædicta reversio* is that which the Queen had granted before to Thomas Tyndal in tail, which now she cannot grant in fee-simple, for *intentio Regine non continet cum lege*, for that which she hath granted first in tail, *she cannot afterwards grant in fee, and the estate tail was granted absolutely, and cannot be merged or destroyed by the said grant upon the said contingency. The second objection, as to the form of the grant, was, that the said grant founded only in covenant, which in the case of inheritance shall not transfer it in the King's case, as it may in case of a chattel, and for that the words are, that the Queen wills and declares, that if the said Thomas Tyndal shall pay 20s. then the said Queen grants, that the said Thomas Tyndal and his heirs shall have the said reversion; so that the reversion itself is not granted, but is a grant which sounds in covenant, that he shall have the said reversion. But it was resolved by the whole Court upon solemn argument, that the said grant was good. (†) And as to the two first objections, it was resolved, that such grant with a condition precedent may be made, as well of things which lie in grant, as of land which lies in livery, and may be (‡) annexed as well to an estate tail, which cannot be merged, as to an estate for life, or years, which may be merged by the access of a greater estate. But such increase of an estate by force of a condition precedent ought to have four incidents: 1. (§) It ought to have a particular estate, as a foundation upon which the increase of the greater estate shall be built. 2. That such particular estate ought to continue in the lessee or grantee, till the increase happens. (||) 3. It ought to vest at the time the contingency happens, or otherwise it shall never vest. 4. The particular estate and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time, and not by several deeds delivered at several times (A). As to the first, it is proved by all the said books, that there ought to be a precedent estate, upon which the estate, as upon a foundation, may increase (¶): but Coke Chief Justice said, that such foundation ought to be permanent and not revocable at the will of the grantor or lessor; and therefore if a man grants an advowson to another at will, upon condition that if he do such a thing that he shall have fee, in that case the estate at will is not any such foundation as the law requires to support an increase of an estate of freehold or inheritance; for the grantor may determine the will before the condition per-

(A) In Shephard's Touchstone, 129. another requisite is mentioned, viz. that the condition be possible and lawful; for upon an impossible condition the estate cannot,

and upon an unlawful condition it shall not, increase. Vid. Fearné Cont. Remainders, 279, 7th ed. Com. Dig. Cond. B. 2.

formed, and so avoid his own grant, and a lease at will cannot support a remainder over. And if a man grants an advowson, or a rent, &c. for years upon condition that if the lessee pays 10s. within one year, that he shall have for life, and if after the year he pays 20s. that he shall have fee; the lessee pays the 10s. within the year, and after the year he pays the 20s. according to the condition, yet he shall have but for life, for the estate for life at the time of the grant was but in contingency, which is not a foundation upon which a greater can increase, for a possibility cannot increase upon a possibility, and the estate of *fee-simple cannot increase upon the estate for years, for that is merged by the access of the estate for life, as shall be afterwards said. As to the second, the privity of estate ought to (a) continue; and that is proved by the said case of the Lord Lovell: and therefore if the lessee for life or years, or the donee in tail who has such a condition annexed to his estate, aliens before the condition performed; or if lessee for life, or years, surrenders to the lessor, he shall never take benefit of the condition afterwards, for the privity of estate in such case ought to continue, for the increase of the estate ought to enure upon the particular estate, as upon a foundation; and therefore if in such case the lessee for life or years, or the donee aliens all his estate, and takes back an estate, and afterwards performs the condition; yet nothing shall thereby accrue to him, because by the absolute alienation, the privity was once absolutely destroyed, which cannot by any reprisal of an estate be revived: as if one coparcener after partition makes a feoffment in fee, and takes back an estate to herself again, and her heirs, yet the privity of the estate to have (b) aid to deraign the warranty paramount is destroyed, 11 H. 4. 22 b. *Vide* 38 E. 3. 20 b. So if tenant by homage (c) ancestral makes a feoffment in fee, and takes back an estate to him in fee, he shall not hold by homage ancestral, Lit. 32. lib. 2. 33 b. But if lessee for life, &c. grants his estate upon condition, and enters for the condition broken, and afterwards performs the condition, there peradventure the fee shall accrue to him; for the possibility was not absolutely destroyed; and when he enters for the condition broken, he is in his old estate; and that the particular estate should continue to all respects is not necessary; but if such a privity of estate continues as is capable of an increase, it is sufficient. And therefore, if such lessee for life makes a lease for years, or if lessee for years makes a lease for a lesser term; or if such donee makes a lease for his own life, or for years, yet for the privity of estate which continues in them, they are capable of an increase of an estate: but if such tenant in tail makes a lease for the life of another, there he is not capable of any increase, because he has gained a new reversion in fee, and the first privity doth not remain; and yet in such case if the lessee for life dies, there the first privity of estate is revived. So if a (d) man makes a gift to one, to have and to hold to him, and his heirs of the body of

wife begotten, with condition to have fee, the wife dies without issue, by performance of the condition he shall have fee. (d) 2 Brownl. 251. Raymond 414.

Cr. Jac. 461.
Cr. Car. 577.
10 Co. 50 b.
1 Roll. Rep. 321.
Co. Lit. 25 b.
1 Co. 156 b.
1 Sid. 451.

[*75 b.]

The privity of estate ought to continue.

(a) 35 H. 8. Br. Exposit. de parols 44.
1 Co. 154 b.
8 Co. 145 b.
Plowd. 483 b.
Cr. Car. 359.

If lessee for life, &c. grants his estate upon condition, and enters for the condition broken, and performs the condition, perhaps he shall have fee.

(b) Br. Aid. 46.
1 Roll. 182, 183.
Br. Perempt. 10.
Br. Coparcen. 5.
Br. Counterpl. de Aid 21. Fitz. Counterpl. de Aid 14.
(c) Lit. sect. 147. Co. Lit. 103 a. 202 b.

Gift to one and his heirs of the body of his

(a) 2 Brownl.
251.

[* 76 a.]

If joint tenant make partition of a term, to which a condition to have fee is annexed, the condition is gone.

(b) 2 Roll. Rep.
484.

It is not requisite that the increase should merge the particular estate.

Lease for years, on condition to have fee, if the lessor ousts him, upon ouster the lessee shall have fee.

(c) Co. Lit.
217 a.
1 Co. 84 b.

A possession for an instant is sufficient to support the increase of the fee.

Privy of estate on the part of the lessor need not be continued.

(d) Co. Lit. 217
a. 378 b. Plowd.

26 a. 34 b. 487 a. Dyer 209. pl. 21. Perk. sect. 729. 1 And. 316. Cr. Jac. 698. 1 Jones 58, 59. Godb. 105. 1 Roll. Rep. 478, 485. 21 H. 7. 11 b. Goldsb. 6. 1 Co. 84 b. 2 Brownl. 227, 294. (e) Co. Lit. 217 a. (f) Plowd. 486 b. 487 a.

his wife begotten, with such condition *ut supra*, and afterwards the wife dies without issue, so that now he is become tenant in tail after possibility; in that case, although the estate be changed, yet forasmuch as the privy remains, he may by the performance of the condition have fee after. So if a (a) lease be made to two, with condition to have fee, and one dies, the survivor may perform the condition and have fee. But if the said *joint-tenants have made partition of the term, the condition is destroyed; for the estate in fee ought to increase to them jointly, and not in severalty. And in the case at bar, although T. Tyndal had died before the performance of the condition, his heir of his body might have performed it; for although the persons were altered, yet the same estate continued; and this power to perform the condition descended (b) to his heir, as an inheritance annexed to the foundation which descended to him, and he, after the condition performed, should have the reversion in fee *quodam modo* by descent, as in Shelley's case, in the First Part of my Reports. And although it is requisite that privy of estate should continue; yet it is not requisite that the increase should merge the particular estate; for if a man makes a lease for life, the remainder for life, or in tail, on condition that if the first lessee doth such a thing, that he shall have fee; in that case by the performance of the condition he shall have fee; and yet it shall not merge the estate for life, *quod fuit concessum per curiam*. And if a man makes a lease for years, on condition, that if the lessor (c) ousts him within the term, that he shall have fee; in that case, if the lessor ousts him, now the interest of the term is turned into a right; and yet the lessee in such case shall have fee, for two reasons. 1. Because it is the act and wrong of the lessor himself, whereof he shall not take advantage. 2. *Eo instante* that the lessor ousts him, *eo instante* the lessee hath fee, and the title of the lessee is by force of the condition, which is paramount the ouster: and therewith agrees 6 R. 2. (d) *Quid juris clamat*. 20. And that a possession in an instant is sufficient to support the increase of the fee, appears in 12 E. 2. Voucher 265. A man (e) makes a lease for years on condition that if the lessor doth not pay to the lessee 100 marks at the end of the term, that he shall have fee, there the end of the term consists on an instant of time. And if the estate-tail of the Lord Stafford had determined for want of issue, and Ursula had died, so that the reversion of T. Tyndal had come in possession, yet forasmuch as the privy of the estate continueth, although the quality of the reversion is altered to a possession, the condition remaineth. But there is a difference between the continuance of the privy of the estate of the (f) lessor or grantor, and the privy of the estate of the lessee or grantee; for the privy of the estate on the part of the lessor needs not be continued; for although the lessor or grantor aliens his reversion, or is attainted, &c. yet the condition remains; for by no

act that he can do can he frustrate or derogate from his grant ; and therewith agree 31 Edw. 1. *Feoffments et Fails*, † 119. 6 R. 2. *Quid juris clamat* (a) 20. and Plowden's Com. in the said case of the Lord Lovel. But if lessee for years, with condition to have fee, accepts a release from the lessor to him for his life, or in tail, and afterwards the condition is performed, he shall never have fee, because *the estate for years, which is the foundation upon which the fee should increase, is, by his own acceptance of a greater estate, merged, and has no continuance : as if lessee for years, without impeachment of waste (b) takes confirmation for life, the privilege, which was annexed to the estate for years, is lost, 5 H. 5. 9 a. 3 Ed. 3. 44 a. b. in Mary de la Idle's case, 28 H. 8. Dyer 10 b. &c. And it was resolved, that if Queen Elizabeth had died before the condition performed, that yet Tyndal might have performed the condition ; and if Queen Elizabeth under her great seal had refused to take the said money (c) yet if Tyndal had tendered it at the receipt of the Exchequer, that he had gained the fee-simple, for the Queen by no means could countermand or hinder the increase of the estate in such case.

† Co. Lit. 216 b

Lessee for years, with condition to have fee, accepts a release [* 76 b.] from the lessor for life, or in tail upon performance of the condition, he shall not have fee.

(a) Plowd. 487 a.

(b) Dy. 10. pl. 37. 11 Co. 83 b.

5 Co. 13 a.

1 Bulst. 136.

19 H. 6. 23 a.

Poph. 194.

Latch. 269.

† 11 Co. 83 a.

(c) 2 Brownl. 252.

If the condition had been that when I should pay to I. S. 20s. that he should have fee, upon payment, the fee would by operation of law, be divested out of the Queen.

(d) Plow. 489 a.

Co. Lit. 354 b.

2 Co. 53 b.

(e) 2 Brownl. 252.

2 Co. 53 a. b.

Lit. Rep. 123.

Godb. 443. Cr.

El. 640. Br. Es-

cheat 32. Br.

Devise 10.

Fitz. Devise 8.

Plowd. 259 a.

4 Co. 58 a.

Raym. 83.

29 Ass. 31.

Hard. 13, 14.

Swinb. 335. 2 Roll. Rep. 351.

As to the third, it was resolved, that if the condition had been that when Tyndal should pay to I. S. 20s. that he should have fee, that presently by the payment by operation of law, the fee would be (d) divested out of the Queen, and vested in Tyndal, and that for necessity, for if it should not vest at the time of the condition performed, it should never vest ; and therefore if office, or petition, *Monstrans de droit*, or other thing should be requisite, it would make the Queen's grant void, and disable the Queen to make such grant, and therewith agrees Plowd. Com. in the said case of the Lord Lovel ; for there it is said, when the condition is performed, the fee-simple shall be immediately out of the King without petition or *Monstrans de droit*, or other circumstances, for if he ought to stay to use such circumstances, then it will not vest presently ; and if it will not vest presently, *ergo* it will never vest ; for if an estate cannot be enlarged at the time of the enlargement appointed, it shall never be enlarged ; and these are the words of the book ; and therefore for necessity the fee-simple shall pass in the case at bar out of the Queen without any circumstance ; for the law will never require circumstance when it will subvert substance. And therefore there is a notable case in 49 E. 3. 16 a. b. where the case was, that Isabel (e) Goodcheap was seised in fee of a certain house in London, and by her will in writing and enrolled, devised the said house held of the King, to Richard Goodcheap, to him, and to the heirs of his body : so that if he died without issue, that the said lands should be sold by her executors, or executors of executors, &c. and made W. D. and W. W. and I. de T. her executors, and died without heir ; Richard Goodcheap died without issue, by which the house escheated to the King, and afterwards I. one of the executors died, W. W. refused and

W. D. sold, &c. And there it is made a question whether the sale by one executor be good, or not? But it is agreed by all, that if the sale be good, it shall divest the land out of the King; and the reason is for necessity of law, for if the sale doth not divest the land at the time of the sale, no sale shall be made at all, and the executors, *who have but a power, cannot have a petition, *Monstrans de droit*, or other remedy.

[* 77a.]

As to the fourth incident it ought to be by one and the same deed or grant or by two deeds delivered at one time.

(a) Co. Lit. 217 a.
2 Brownl. 252.
(b) 2 Brown. 255. 2 Co. 71 a.
Co. Lit. 272 a.
(c) B. Relat. 1.

As to the fourth incident, it was resolved, that it ought to be by one and the same deed or grant, or by two deeds delivered at (a) one time, which is all one in effect; for, (b) *quæ incontinenti fiunt inesse videntur*; and the reason thereof is, because the foundation, *scil.* the particular estate, and the increase of the estate thereupon, is but one grant to take effect out of one and the same root, although it vests at several times, yet when it is vested, it has its vigour and force of one and the same grant; and therefore it is well said in 27 H. 6. 7 a. (c) that when he has performed the condition he has fee from the time of the commencement of the lease, as by one and the same grant, and as one and the same estate.

(d) 11 Co. 11 b.

As to the first objection against the form of the grant, *scil. prædictam reversionem*, to construe it to extend to the estate-tail granted before to Tyndal (which the Queen cannot grant again), and not to the reversion of the fee (which the Queen may grant, and which is mentioned before); will be a (d) construction tending in great dishonour to the Queen, and in great damage and disinherison of the subject. In dishonour to the Queen for three causes. 1. To have her grant under the great seal by captious and nice constructions avoided. 2. To presume such ignorance in the Queen (who was a wise, learned, and most excellent Princess, and the phoenix of her sex) that she intended to grant that which she could not grant, and not that which she could. 3. That the Queen (as it was objected) could not make such a grant *in futuro*, when a subject might do it without question; therefore *à fortiori*, the Queen might do it in such case. Also it would tend to the damage of the subject who shall have the King's charter under the great seal; but, by a nice and captious construction, he shall lose the land contained therein; which will sometimes tend to the ruin of him and his posterity: and the cases of Sir John (e) Molyns, the Lord (f) Chandos, and the Earl of Rutland, were affirmed for good law. But, note, the Queen grants not only *præd' reversion'*, but also *omn' et singul' præmissa*, &c. (g) which words make this point clear. And as to the last of the said two objections, it was resolved *per tot. cur'*, that the words were sufficient to pass the inheritance of the land; for to pass a future estate upon a contingent, words *in futuro* are apt and sufficient enough, as in all charters and letters patent of lands, the clause of grant of liberties and franchises are all with such words in effect, as these are because they are contingent and *de futuro*. And the (h) invention of this grant to Tyndal was commended by the Justices; for, when the Lord Stafford was tenant in tail, the (i) reversion to Queen Mary, if the Queen had granted the whole fee-sim-

(c) 6 Co. 5 b. 6
a. 11 Co. 11 b.

To pass a future estate upon a contingency words *in futuro* are sufficient.

(f) 5 Co. 55 a.
b. 56 a. 11 Co. 11 b.
(g) 8 Co. 55, 56. 11 Co. 11 b.
(h) 2 Brownl. 253.
(i) 34 and 35 H. 8. cap. 20.

ple to Tyndal, then by a common recovery or fine levied, the *Lord Stafford might have barred his issues, and by a common recovery the reversion to Tyndal in fee, which was neither the Queen's nor Tyndal's intention; but the purpose was, that it should be in the power of Tyndal, and the heirs of his body, to hold and restrain the Lord Stafford and the heirs of his body, that they should not alien or bar his reversion in tail, or by taking the fee-simple out of the crown by the performance of the condition to enable them to alien. But Coke Chief Justice, in his argument moved a question on the statute of (a) 34 H. 8. c. 20. That if the Lord Stafford and his wife had suffered a common recovery with voucher, if that should not bar the reversion which Tyndal had in tail, the reversion in fee being in the crown: and thereupon he considered the words of the said act, the preamble of which seems to provide for the heirs of the bodies of the King's donees. And the question mentioned in the preamble is, "whether such feigned and untrue recoveries against such tenant in tail, &c. should, after the death of the tenant in tail, bind the heirs in tail, or not:" and the body of the act is, "for the plain declaration whereof, and to avoid and extinct from henceforth diversity of opinions in such cases, be it ordained and enacted, that no such feigned recovery hereafter to be had by assent of parties, against any such tenant in tail of any lands, &c. whereof the reversion or remainder at the time of such recovery had shall be in the King, shall bind or conclude the heirs in tail, whether any common voucher be had in any such feigned recovery or not, but that after the death of every such tenant in tail, &c. the heirs in tail may enter, &c." So that by the letter of the act no remedy is provided for him in reversion or remainder in tail, although the reversion of the fee be in the King. But yet the Chief Justice held that by necessary consequence (b) such reversions, and remainders in tail are preserved by the said act: for when there is tenant in tail, the remainder in fee, and tenant in tail suffers a common recovery, the reason of the bar of the estate of him in the remainder who is a stranger to the recovery is, by consequence, because the common recovery bars the estate of the tenant in tail who is party to the recovery, and by consequence, all reversions and remainders of common persons expectant thereupon: but when the act of 34 Hen. 8. provides, that no common recovery had against tenant in tail, who is party to the recovery, shall bar his issues when the King has the reversion, &c. thereby inclusive the act preserves the reversions and remainders in tail of the King's grant, for they cannot be barred, but when the estate tail, upon which they depend, is barred; and that is the reason that when tenant in tail is in of another estate, and suffers a common recovery as tenant, it shall not bar any reversion or remainder, because the same should bar the estate of the tenant in tail, who is party to the recovery; for (c) *quod non valet in principali in accessorio seu consequenti non valebit, et quod non valet in magis propinquo, non valebit in magis remoto*. And if the Lord Stafford might

[*77 b.]

If S. and his wife had suffered a common recovery with voucher, it would not have barred the reversion which T. had in tail, the reversion in fee being in the Crown.

(a) Co. Litt. 372 b. 2 Co. 15 b. 16. 34 & 35 H. 8. c. 20. 10 Co. 37 a. 4 And. 46, 141. 2 Co. 52 a. 6 Co. 55 a. Hob. 299. 2 Roll. Rep. 417. Moor 115, 195. 1 And. 46, 47. 142, 143, 171. Cr. Car. 430. Plowd. 555 a. Yelv. 149. Noy. 132. Co. Lit. 335 a. 1 Leon. 85. 3 Leon. 57. 4 Leon. 40. Benl. in Kelw. 213 a. b. O. Ben. 32. Ben. in Ash. 26. N. Ben. 223. pl. 254. 2 Roll. Rep. 108. Raym. 349. Cr. Eliz. 595. (b) Co. Lit. 372 b. 2 Roll. Rep. 68.

[*78 a.]

(c) 2 Brownl. 253.

If the reversion in fee had remained in the crown the fine levied by E. would not have barred the issue but such issue might have entered.

(a) Mo. 115, 467. Ben. in Kel. 213. Cr.

Fl. 595, 612. Cr. Car. 430. 4 Leon. 40. 1 Anders. 46. (b) Hob. 333. Co. Lit. 373 a. Raym. 323, 324. Sav. 105.

have barred the reversion in tail of Thomas Tyndal before the condition performed, the invention of the said grant had failed of its final purpose: for which cause it seemed to the Lord Chief Justice, that the said act preserves the said reversion of the said Thomas Tyndal; *quod fuit concessum per totam curiam*. Lastly, it was resolved *per totam curiam*, that if the (a) reversion in fee had remained in the crown, that the fine levied by the said Edward Lord Stafford, the father, had not barred the Lord Stafford that now is, but that he might enter according to the resolution in (b) Notley's case, *Pasch. 31 Eliz. in Communi Banco, et præcipue* by reason of these words in the said act of 34 H. 8. "The said recovery, or any other things or thing hereafter to be had, done or suffered, by or against the such tenant in tail, to the contrary notwithstanding" (n).

(n) Vid. upon the construction of the stat. 34 H. 8. c. 20. note (c 1.) *Wiseman's case*, Vol. I. p. 458.

[78 b.]

WYAT WILD'S CASE,

Trin. 7 Jacobi I.

In the Common Pleas.

WOOD
v.
NORTON.
Pt. VIII.—78 b.

If a commoner purchases parcel of the land in which he has common appendant, the common shall be apportioned: but if he purchase parcel of the land in which he has common appurtenant; such common is extinct.

But in either case, the common shall be apportioned by the alienation in fee of parcel of the land to which, &c.

And the alienee may plead that he is seised, &c. and that he and all those whose estate he has, &c. have used to have common of pasture, &c. S. C. 1 Brown. 180.

In a replevin between William Wood, plaintiff, and William Norton, Esq. defendant, upon taking of his sheep at Croydon in the county of Surry, in a place called Norwood: the defendant said, that the place where, &c. doth contain 200

acres, part of the manor of Croydon, and entitled himself to have common there, and avowed for damage feasant. The plaintiff, in bar of the avowry, said, that before and at the time of the taking, he himself was, and yet is seised of five acres of land in Croydon, aforesaid in fee, and that he and all those whose estate he has in the said five acres *a tempore cujus*, &c. have used to have common of pasture in the said 200 acres for all his commonable cattle levant and couchant upon the said five acres of land, at all times of the year, as to the said five acres of land appertaining; for which cause he put in his sheep, &c. To which the defendant said, that before the said William Wood had any thing in the said five acres of land, one Wyat Wild was seised of a messuage and 40 acres of land, in Croydon aforesaid, whereof the said five acres were parcel, in fee, and that the said Wyat, and all those whose estate he had in the said messuage, and 40 acres of land, whereof, &c. *a tempore cujus*, &c. had common of pasture in the said 200 acres for all his commonable cattle, levant and couchant upon the said messuage and 40 acres of land, whereof &c. as to the said messuage and 40 acres of land appertaining, and the said Wyat being so seised of the said five acres, enfeoffed one John Wood in fee, whose estate the said William Wood before the time of the taking, &c. had, *idemque Williel' Wood, colore inde clam' commun' pastur'* in the said 200 acres, &c. *pro omnibus aver' suis communib' sup' præd' quinq' acr' ter'* levant and couchant, &c. *put in his cattle, and he took them as damage-feasant, &c. [* 79 a.] upon which the plaintiff demurred in law. And the last term and this term this case was argued by the Serjeants at the bar; and now at this term it was argued at the Bench by all the Justices, sc. Coke Chief Justice, Walmesley, Warburton, Daniel, and Foster: and in this case two points were resolved.—1. That (be the said (a) common appendant or appurtenant) the common in the case at bar is apportionable. 2. That the pleading thereof was sufficient. As to the first it was well agreed that common appendant was of common right, and severable; and although the commoner in such case purchases parcel of the land in which, &c. yet the common shall be apportioned, but in such case common appurtenant, and not appendant, by (b) purchase of parcel of the land in which, &c. is extinct for the causes and reasons given in Tyrringham's case, all which was affirmed for good law by the whole court (A). And it was strongly urged, that common appurtenant shall not be severable in the case at the bar for divers reasons. 1. Because this common appurtenant wholly belonged to a house and 40 acres of land by prescription; and he by his own act cannot make this entire thing several. 2. The feoffee of parcel shall not have common, because the prescription fails, for no common was ever appurtenant to that parcel, but to the

(a) Hob. 235.
Noy. 30. 1 Jones
397. 1 Roll. 234.

(b) Winch. 45.
Hob. 235. 4 Co.
38 a. Co. Lit.
122 a.

(A) Vid notes to Tyrringham's case, Vol. II. p. 380. et seq.

messuage and all the land. 3. Common appurtenant is a thing against common right, and therefore by the act of the party shall be no more severed or divided, than a condition or *nomine pænæ*, or any other thing against common right. As to that it was answered and resolved, that it appears by the prescription, that the said common is severable, for the prescription is to have common in the land, in which, &c. to be taken by the mouths of his beasts which are (a) levant and couchant on the land, to which, &c. and that extends to the whole, and to every parcel, and it can be no more damage or charge to the tenant of the land in which, &c. after the severance, than it was before, for no other beasts can pasture there, but those which are levant and couchant on the land, to which, &c. But if he who has common appurtenant (b) purchases parcel of the land in which, &c. all the common is extinct: or, if he takes a (c) lease of parcel of the land, all is suspended, because it is the folly of the commoner to intermeddle with part of the land in which, &c. which belongs not to him: but when the commoner intermeddles but only with his own land, by alienation thereof, that shall not in such case turn to his prejudice, for that is not against any rule of the law, as the other case, when he purchases part of the land, in which, &c. because his common appurtenant was against *common right; and he cannot common in his own land which he has purchased. And it will be a great inconvenience, if by the alienation of parcel the alienee shall lose the common which belongs to him, for then the alienor shall lose his common also; for by the reason which has been made, Wyat Wild cannot prescribe to have common to the house and 35 acres, because the common was entirely appurtenant to the messuage and 40 acres, and if the law should be such, all common appurtenant in England would be (d) destroyed (which would be against the commonwealth) for no land continues in so entire a manner, every acre together with another, as it has been *ab initio*, but for preferment of younger sons, advancement of daughters, payment of debts, or other necessary considerations, part has been severed; and therefore this case is not like a condition, or *nomine pænæ*, which are entire, and not severable by the act of the parties, but is like a rent reserved on a lease for years: and therefore if a man makes a lease of three acres, each of equal yearly value, repndering 3s. rent, and the lessor grants the reversion of one acre, and the tenant attorns (e), the grantee shall have 12d. rent; for although it was one lease, one reversion, and one rent, yet that was incident to the reversion, which was severable, and the rent shall wait upon the reversion, and upon every part of it. So in the case at bar, although at the beginning

(a) Cr. Car. 482.
Noy 30. Hob.
235.

(b) 1 Anderson
159. 1 Leon 43,
44. Goldsb. 53.
Winch. 45.
Noy. 30. Co.
Lit. 122 a. 4
Co. 38 a.
(c) 9 Co. 135 a.
Co. Lit. 148 b.
1 Roll. 938.

[* 79 b.]

Co. Lit. 122 a.

(d) Noy 30.
4 Co. 38 a.
Hob. 235.

Moor 114.
Co. Lit. 148.

(e) Attornment is now unnecessary, Ann. c. 16. s. 9. but that the grantee may be able to recover his part of the rent from the lessee, it is still necessary that the lessee

should agree to the apportionment, or that the apportionment should be made by a jury, *Bliss v. Collins*, 5 Barn. and Ald. 876. S. C. 1 Dow. and Ryl. 291. 4 Madd. 229.

there was but one common attendant upon one tenancy ; yet forasmuch as it is attendant upon the tenancy which is severable, and upon every part of it, the alienee of part of the tenancy shall have common. So if he who has such common appurtenant to land, leases part of the land to another, the lessee shall have common for the beasts levant and couchant ; and if an advowson be appendant to a manor which descends to divers coparceners, and the coparceners make partition of the manor to which, &c. without speaking of the advowson, the advowson, notwithstanding the division and severance of the manor to which, &c. remains appendant, 13 E. 3. *Quare imp.* 58. 19 Ed. 3. *ibid.* 59. 17 E. 38. 43 Ed. 3. 35. 13 E. 2. *Quare imp.* 170. 2 H. 7. 5. *Vide* 4 Eliz. Dy. 213.

Moor 463.

3 Salk. 24. 14
Ray. 198.

VYNIOR'S CASE.

Trin. 7 Jac. 1. Rot. 2629.

*WILLIAM WILDE, late of Themilthorp in the county aforesaid, yeoman, otherwise called William Wilde of Themilthorp in the county aforesaid, yeoman, was summoned to answer to Robert Vynior of a plea, that he render to him 20*l.* which to him he oweth, and unjustly detaineth, &c. And whereupon the said Robert, by Thomas Vynior his attorney, saith, that whereas the said William, on the 15th day of July, in the 6th year of the reign of the lord the now King of England, France, and Ireland, at Themilthorp, by his certain writing obligatory, granted himself to be bound unto the said Robert in the aforesaid 20*l.* to be paid to the said Robert when he should be thereunto required ; yet the aforesaid William, although often required, the aforesaid 20*l.* to the said Robert hath not yet rendered, but to render the same to him hath hitherto denied, and as yet doth deny, whereupon he saith that he is injured, and hath damage to the value of 10*l.* and thereof he bringeth suit ; and he brings here into court the writing aforesaid, which doth testify the debt aforesaid in form aforesaid, whose date is the day and year abovesaid, &c. And the aforesaid William, by John Russel his attorney, comes and defends the force and injury when, &c. and prays oyer of the writing aforesaid, and it is read unto him. He also prays oyer of the condition of the same writing, and it is read unto him in these words : " The condition of this obligation is " such, that if the above bounden William Wilde do and shall " from time to time, and at all times hereafter, stand to, abide, " observe, perform, fulfil, and keep, the rule, order, judgment,

[* 80 a.]
Debt upon
bond.

Defendant
craves oyer of
the bond and of
the condition
which was to
perform an
award to be
made by, &c.

[* 80 b.] “arbitrament, sentence, and final determination of William Rugge, Esq. arbitrator indifferently named, elected, and chosen, as well of the part and behalf of the said W. Wilde, as of the part and behalf of the abovenamed Robert Vynior, to rule, *order, adjudge, arbitrate, and finally determine, all matters, suits, controversies, debates, griefs, and contentions heretofore moved and stirred, or now depending between the said parties, touching or concerning the sum of two and twenty pence, heretofore taxed upon the said W. Wilde, for divers kind of parish business within the said parish of Themilthorpe; so as the said award be made and set down in writing, under the hand and seal of the said William Rugge at or before the feast of St. Michael the Archangel next ensuing after the date of these presents, that then this present obligation to be void and of no effect, or else the same to stand, abide, remain, and be in full force, power, strength, and virtue.” Which being read and heard, the said William Wilde saith, that the aforesaid Robert ought not to have his action aforesaid against him, because he saith, that the arbitrator aforesaid, after the making of the writing, and before the aforesaid feast of St. Michael the Archangel, in the condition aforesaid above specified, did not make any award in writing, under the hand and seal of the same arbitrator, between him the said William and the aforesaid Robert, of and upon the premises aforesaid, in the condition aforesaid above specified, according to the form and effect of that condition; and this he is ready to verify, whereupon he prayeth judgment if the aforesaid Robert ought to have his action aforesaid against him, &c. And the aforesaid R. saith, that he by any thing before alleged ought not to be barred from having his action aforesaid, because he saith that the said William Wilde after the making of the writing aforesaid, and before the aforesaid feast of St. Michael the Archangel, then next following, that is to say, on the 22nd day of August, in the 6th year of the reign of the Lord the now King of England, &c. aforesaid, at Themilthorpe aforesaid, by his certain writing, which the said Robert sealed with the seal of the said William, brings here into Court, whose date is the same day and year, reciting, that whereas he the said William then stood bounden to the aforesaid Robert, by the name of Robert Vynior, in one writing obligatory in the sum of 20*l.* with condition in the said writing for the performance and fulfilling of the arbitrament, rule, order, judgment, sentence, and final determination of William Rugge, Esq. arbitrator, chosen as well on the part of the said William Wilde, as on the part of the abovenamed Robert Vynior, as in the said writing obligatory more fully it appeared, or might appear, then the said William intending the revocation thereof, by the said writing of revocation, revoked and did call back all the authority whatsoever which the said William Wilde, by the said writing obligatory had given and *committed to the aforesaid William Rugge, his arbitrator, and then altogether disallowed and held void, and all and whatsoever the aforesaid William Rugge, after the delivery of the

And pleads
that the arbi-
trator made no
award.

Replication
that the defen-
dant revoked
the authority
given by him to
the arbitrator.

[* 81 a.]

same writings of revocation, should do to (for) him in and about the said arbitrament, rule, order, judgment, arbitrament, sentence, and determination of all matters, suits, controversies, debates, griefs, and contentions, then before moved and stirred, or then after depending between the said parties, touching or concerning the sum of 22*d.* taxed upon the said William Wilde, according to the aforesaid writing obligatory, as it was in the same writing mentioned and declared, as by the said writing of revocation more fully appeareth, and this he is ready to verify; whereupon, inasmuch as the aforesaid William Wilde, after the making of the writing aforesaid, before the said feast of St. Michael the Archangel, then next following, in form aforesaid, discharged and disallowed the arbitrator aforesaid, of all authority of arbitrating of and upon the premises in the condition aforesaid above specified, contrary to the form and effect of the condition and submission in the same mentioned, the said Robert prayeth judgment and his debt aforesaid, together with his damages, by occasion of detaining of the same debt to be adjudged unto him, &c. with this, that the said Robert will verify that the aforesaid writing obligatory here into Court brought, and the aforesaid writing in the aforesaid writing of revocation specified, is one and the same writing, and not other, nor divers, &c. And the said William Wilde saith, that the plea of the said Robert above, by replication pleaded, is not sufficient in law for him the said Robert to have and maintain his action aforesaid, against the said William, and that he to that plea, in manner and form aforesaid pleaded, needeth not, nor by the law of the land is bounden to answer, and this he is ready to verify; whereupon for want of a sufficient replication in this behalf, the said William prayeth judgment, and that the said Robert may be barred from having his action aforesaid against him, &c. and the said Robert, inasmuch as he in above replying hath alleged sufficient matter in law for him the said Robert to have and maintain his action aforesaid against the said William, which he is ready to verify, which matter the aforesaid William doth not deny, nor to the same in any ways answereth, but the averment aforesaid to admit doth altogether refuse, as before prayeth judgment, and his debt aforesaid, together with his damages, by occasion of detaining his debt, to be adjudged unto him, &c. And because the Justices here will advise themselves of and upon the premises before they give their judgment thereof, day is given to the parties aforesaid here until in eight days of St. Michael, to hear their judgment thereof, because the Justices here thereof are not yet, &c.

Demurrer.

Joinder.

Cur. advis. vult.

[81 b.]

VYNIOR'S CASE,

Trin. 7 Jacobi I.

VYNIOR
v.
WILDE.
Pt. VIII.—81 b.

Debt upon bond conditioned to stand to, abide by and perform an award, &c., the defendant after demanding oyer of the bond and condition pleaded no award made; the plaintiff replied that the defendant before the time, &c. revoked and recalled his authority; upon demurrer to the replication, judgment was given for the plaintiff; and resolved,—
1. Where a man is bound by bond to stand to, abide by, and perform, &c. the award of an arbitrator, he may countermand the authority of the arbitrator. 2. The plaintiff in his replication need not aver that the arbitrator had notice of the countermand, for that is implied in the words revoked and recalled all the authority, &c. 3. By the countermand, the bond is forfeited. S. C. [1 Brownl. 62. 2 Brownl. 290.]

*TRIN' 7 Jacobi, Rot. 2629, Robert Vynior brought an action of debt against William Wilde, on a bond of 20*l.* 15 Julii anno 6 regis nunc. The defendant demanded oyer of the bond, and of the condition thereon indorsed, which was, "that if the above bounden William Wilde do, and shall from time to time, and at all times hereafter, stand to, abide, observe, perform, fulfil, and keep, the rule, order, judgment, arbitrament, sentence, and final determination of Wm. Rugge, Esq. arbitrator indifferently named, elected, and chosen, as well on the part of the said William Wilde, as on the part of the said Robert Vynior, to rule, order, adjudge, arbitrate, and finally determine all matters, suits, controversies, debates, griefs, and contentions heretofore moved and stirred, and now depending between the said parties, touching or concerning the sum of two and twenty pence heretofore taxed upon the said Wm. Wilde, for divers kinds of parish business, within the parish of Themilthorpe in the county of Norfolk, so as the said award be made and set down in writing under the hand and seal of the said Wm. Rugge, at or before the feast of St. Michael the Archangel next ensuing, after the date of these presents, that then," &c. And the defendant pleaded, that the said Wm. Rugge, nullum fecit arbitrium de et super præmissis, &c. The plaintiff replied, that after the making of the said writing obligatory, and before the said feast of St. Michael, scil. 22 Aug. anno 6, supradicto apud Themilthorpe præd' prædict' Willihelm' Wilde per quodd' script' suum cujus datus est eisdem die et anno (a)*

(a) March. Arbit, 167.

revocavit et *abrogavit, Anglice, did call back, omnem auctoritatem quamcumque quem idem Willielmus Wilde per præd' scriptum obligatorium dedisset, et commisisset præfuit Willielmo Rugge arbitratori suo, et adtunc totaliter deavocavit, et vacuum tenuit totum et quicquid dict' Willielmus Rugge post deliberationem ejusdem scripti sibi fueret in et circa dict' arbitrium regulam, &c. unde ex quo præd' Wil'mus Wilde post confectionem præd' scripti, et ante præd' festum Sancti Michaelis tunc prox' sequen' in forma præd' exoneravit, et abrogavit arbitratorem præd' de omni auctoritate arbitrandi de et super præmissis in conditione præd' superius specific' contra formam et effectum conditionis illius, et submissionis in ead' mention' idem Robertus petit judicium, &c. Upon which the defendant demurred in law. And in this case three points were resolved. 1. That although W. Wilde the defendant was bound in a bond to stand to, abide, observe, &c. the rule, &c. arbitrament, &c. yet he might (a) countermand it (A); for a man cannot by his act make such

[* 82 a.]

1. Point.

(a) 2 Vent. 117.

291. March. Arbitrament 165.

Br. Arbit. 49. Doct. pl. 40.

(A) Generally speaking, the submission may be revoked at any time before an award is made. *Per Dallas, C. J. Clapham v. Higham*, 1 Bing. 89. S. C. 7 B. Moore, 403. Nor has the stat. 9 & 10 W. 3. c. 15., made any difference in this respect, *Milne v. Greatrix*, 7 East. 611.; and the submission may equally be revoked, whether it be by deed, or other writing, or by a judge's order, or order of *Nisi Prius*, *Clapham v. Higham*, *Milne v. Greatrix*, *ub. sup.* It seems that where the submission is by deed, the revocation ought to be by deed also, according to the rule.—*Unumquodque eo dissolvi ligamine quo ligatum est.* Vid. *Rez v. Wait*, 1 Bing. 121. S. C. 7 B. Moore, 473. *Contra, Parker v. Lees*, 2 Keb. 64.

But the party cannot revoke his bond or deed of submission, *Milne v. Greatrix*, *ub. sup.* but will be liable to be sued upon it. And if after the submission (whether such submission is by a judge's order, order of *Nisi Prius*, or agreement within stat. 9 & 10 W. 3.) is made a rule of Court, either party revokes the submission, such party so revoking will be guilty of and liable to an attachment for a contempt, *Milne v. Greatrix*, *Higham v. Clapham*, *ub. sup.* And where a judge's order contained not only the submission of the parties, but directed that either party should, under certain circumstances, pay to the other such costs as the Court should think reasonable and just; it was held that such order might be made a rule of Court after a revocation, in order to enable the Court to dispose of the question of costs. *Aston v. George*, 2 Barn. and Ald. 395. S. C. 1 Chitty, 200. for a judge's order may be made a rule of Court, without reference to any statute, and so differs from a submission

by deed, which can alone be made a rule of Court, by virtue of the stat. 9 & 10 W. 3. c. 15.; and such submission by deed being revoked, there remains nothing to be made a rule of Court, *ib.* And accordingly in *King v. Joseph*, 5 Taunt. 452. where the submission was by deed, and was made a rule of Court after the revocation of the arbitrator's authority, the Court set aside the rule for making the submission a rule of Court.

If there be a submission by a feme sole, and she marry before an award made, it will be a revocation, Com. Dig. Arbit. D 5. Anon. W. Jones, 388. *Charnley v. Winstanley*, 5 East. 266. and the cases cited there; for her marriage is in law a civil death of all her rights, *Andrews v. Palmer*, 4 Barn. and Ald. 252. and such marriage will be a breach of the agreement to submit, *Charnley v. Winstanley*, *ub. sup.*

So also the death of either party to a submission before award made is a revocation of the arbitrator's authority, whether the reference is by deed, rule of Court, or whether under an order of *Nisi Prius*, and a verdict taken subject to the award. *Rhodes v. Hargh*, 2 Barn. and Cress. 345. S. C. 3 Dow. and Ryl. 608. and the cases cited there, *Blundell v. Brettargh*, 17 Ves. 232. And where two of the plaintiffs in an action were guardians and trustees of an infant tenant for life, and an award was made against them in their characters of trustees, and respecting the infant's property, before which the infant had died, the Court set aside the award as against the trustees, *Bristow and Others v. Binns*, 3 Dow. and Ryl. 184.

It is now usual to provide in an order of *Nisi Prius*, that the death of either party

authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable; as if I make

shall not operate as a revocation, but that the award shall be delivered to their personal representatives, according to the suggestion of Abbott, C. J. in *Cooper v. Johnson*, 2 Barn. and Ald 395. Where a verdict was taken subject to the award of an arbitrator, and by the order of reference, the award was to be delivered to the parties; or, if they or either of them were dead before the making of the award to their respective personal representatives, on or before a given day, with liberty to the arbitrator to enlarge the time for making his award. The plaintiff died before the award was made; and after his death, the arbitrator enlarged the time for making the award. The Court held, that the award made within the enlarged time was good. *Tyler v. Jones*, 3 Barn. and Cress. 144. S. C. 4 Dow. and Ryl. 740. And in *Dowse v. Cox*, 3 Bing. 20., the Court held that where there was a clause in the reference, that it should not abate in case either of the parties should die, an award made after the death of one of the parties was good.

It seems that the death of one of several parties on the same side, to a joint and several submission, is not a revocation as to the others. Therefore where differences arose between the owners of a ship and the freighters, (the latter having distinct interests in the cargo) and it was agreed between them, that the matters in difference should be referred to arbitration; it was held that the death of one of the freighters before award made only affected the award as to him, and was no revocation as to the others. Per 3 Js. MSS. Hil. Term, 1820, cited in the Addenda, 2 Archb. Practice, p. 24.; and where the interest is joint, and the cause of action survives, an award made after the death of one, and against the survivors, might perhaps be good. *Edmunds v. Cox*, 2 Chitty, 435. But it would be bad if made not only against the survivors, but also directing the executors of the deceased to give a release, *ib.* and *vid. Bristow and Others v. Binns*, 3 Dow. and Ryl. 184.

Where after judgment by *nil dicti*, in an action of ejectment to recover possession of a mill, the lessor of the plaintiff and the defendant, by bond, submitted the right of the mill to arbitration, and then the lessor of the plaintiff sued out a *habere facias possessionem*, the Court was of opinion that this act, by taking away the subject matter of the reference, had taken away the possibility of making the arbitration, *Green v. Taylor*, T. Jones, 134.

As bankruptcy does not put an end to a

suit, which the bankrupt has instituted, so therefore it cannot put an end to an arbitration founded on such suit. *Andrews v. Palmer*, 4 Barn. and Ald. 250. and *vid. Snook v. Hellyer*, 2 Chit. Rep. 43.

The effect of a revocation of the submission is, to determine the arbitrator's power entirely, and any award made afterwards is a mere nullity. *Milne v. Greatrix*, *Marsh v. Bulteel*, 5 Barn. and Ald. 507. S. C. 1 Dow. and Ryl. 106. S. C. 2 Chit. 317. And in *Clapham v. Higham*, *ub. sup.* where a cause was referred under a judge's order, the Court set aside an award, where the arbitrator's authority had been revoked, and notice thereof given to him before the judge's order had been made a rule of Court. But in *King v. Joseph*, where the submission was by deed, the Court under similar circumstances, although they set aside a rule that had been obtained, for making the submission a rule of Court, refused to set aside the award; Gibbs, C. J. assigning as a reason, that it would deprive the other party of his action. But as the award would be a nullity, an action would be brought, not for non-performance of the award, but for not submitting to arbitration according to the agreement. Indeed if the declaration in an action, founded upon the deed of reference, should under such circumstances aver the making an award, and allege as a breach the non-performance of it; the revocation and notice of it to the arbitrator would be a good plea in bar, *Marsh v. Bulteel*, *ub. sup.* Although the reasoning of C. J. Gibbs is not satisfactory, yet the decision in this last case seems more reconcileable to principle than that in *Clapham v. Higham*; for it is difficult to see what jurisdiction the Court could have over the award, except it was given to them by making the submission a rule of Court. In the case of a deed, by the revocation the submission is gone, and consequently there is nothing to make a rule of Court. So also it would seem that a revocation, made before a judge's order is made a rule of Court, is also a revocation of the submission; and therefore the submission being gone, there remains nothing to make a rule of Court, which can give them power over any act done, by virtue of the submission. Although if the order contain something ulterior the submission; for the purpose of enforcing that part of the order, it may be made a rule of Court, *supra*, and *vid. Aston v. George*, *ub. sup.*

a (a) letter of attorney to make livery, or to sue an action, &c. in my name; or if I assign auditors to take an account; or if I make one my factor; or if I submit myself to an arbitrament; although these are made by express words irrevocable, or that I grant or am bound that all these shall stand irrevocably, yet they may be revoked: so if I make my testament and last will (b) irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable, which is of its own nature revocable. And therefore (where it is said in 5 Ed. 4. 3 b. (c) if I am bound to stand to the award which I. S. shall make, I could not discharge that arbitrament, because I am bound to stand to his award, but if it be without obligation it is otherwise) it was there resolved, that in both cases the authority of the arbitrator may be revoked; but then in the one case he shall forfeit his bond, and in the other he shall lose nothing; for, *ex (d) nuda submissione non oritur actio* (b): and therewith agrees Brooke in abridging the said book of 5 Ed. 4. 3 b. and so the book of 5 Ed. 4. is well explained. *Vide (e)* 21 H. 6. 30 a. 28, 29. (f) H. 6. 6 b. 49 E. 3. 9 a. 18 E. 4. 9. 8 Ed. 4. 10. 2. It was resolved, that the plaintiff need not aver, that the said William Ruge had notice of the countermand, for that is implied in these words, *revocavit et abrogavit omnem auctoritatem*, &c. for without notice it is no revocation or abrogation of the authority (c): and therefore if there was no notice, then the defendant might take issue, *quod non revocavit*, &c. and if there was no notice, it should be found for the defendant; as if a man pleads, *quod (g) feoffavit, dedit, or demisit pro termino vitæ*, it implies livery, for without livery it is no feoffment, gift, or demise; but there is a difference when two things are requisite to the performance of an act, and both things are to be done by one and the same party, as in the case of feoffment, gift, demise, revocation, countermand, &c. And when two things are requisite to be performed by several persons; as of a grant of a reversion, attornment is not implied in it, and yet without attornment the grant hath not perfection, but forasmuch as the grant is made by one, and the attornment is to be made by another, it is not implied in the pleading of the grant of one; but in the other case both things are to be done by one and the same person, and that makes the difference. And therewith agrees (h) 21 H. 6. 30 a. where W. Bridges brought an action of debt for 200*l.* on an arbitrament against William Bentley; the defendant pleaded, that before any judgment or award

(a) March Arbit. 165.
Vin. Ab. Auth. A.

(b) March Arbit. 165.
Bac. Max. Reg. 19.
(c) Mar. Arbit. 164.
1 Roll. 331.
Br. Arbit. 35.
See 8 E. 4. 10 b. per Catesby.

(d) Mar. Arb. 164.

(e) Postea 82 b. Br. Arbit. 49.
2d. Point.

(f) Fitz. Arb. 12. Br. Arb. 4.

[*82 b.]

(g) Cr. El. 401.
Cr. Jac. 411,
637. Cr. Car.
101, 170.
Kelw. 7 a.
Noy. 118.
Doct. pl. 48,
49, 239.
Yelv. 135.
Br. Pleadings
145. in Fine.
22 E. 3. 15 b.
per Tremail.
Plowd. 149 b.
Co. Lit. 303 b.
5 B. and A. 511.
1 D. and R. 109.
(h) Antea 82 a.
Br. Arbit. 49.

(b) But an action of assumpsit will lie in case of a breach for revoking the submission, although the submission is not under seal, *Newgate v. Degelder*, 2 Keb. 10. 20. 24. S. C. 1 Sid. 281. So also where an award is made for the performance of a collateral act, where the submission was without deed, the party may have assumpsit to compel performance, although formerly the contrary was held. *Vid. n. 5. Hodsdon v. Harbridge*, 2 Saund. 62 a.

(c) Where the revocation is by express act of the party, notice must be given to the arbitrator: but where the revocation is by marriage or death, no notice of the revocation is necessary. *Roll. Ab. Auth. E. pl. 4. Blundell v. Brettargh*, 17 Ves. 232. and *vid. acc.* with Vynior's case, that there need not be an averment in the pleadings, that the arbitrator had notice, *Marsh v. Bulleuel*, 5 Barn. and Ald. 507. S. C. 1 Dow. and Ry. 106. S. C. 2 Chit. 317.

made by the arbitrators, the said William Bentley discharged the said arbitrators at Coventry, in the county of Warwick; and it was held a good bar, and yet he did not aver any notice to be given. So it is adjudged in (a) 28 H. 6. 6 b. 6 H. 7. 10, &c. 3. It was resolved, that by this (b) countermand or revocation of the power of the arbitrator, the obligee shall take benefit of the bond, and that for two reasons. 1. Because he has broken the words of the condition, which are "that he should stand to, and abide, &c. the rule, order," &c. and when he countermands the authority of the arbitrator, "he doth not stand to and abide," &c. which words were put in such conditions, to the intent that there should be no countermand, but that an end should be made, by the arbitrator, of the controversy, and that the power of the arbitrator should continue till he had made an award; and when the award is made, then there are words to compel the parties to perform it, *scil.* observe, perform, fulfil, and keep the rule, order, &c. and this form was invented by prudent antiquity; and it is good to follow in such cases the ancient forms and precedents, which are full of knowledge and wisdom; and with this resolution agrees the said book of (c) 5 Ed. 4. 3 b. which is to be intended, *ut supra*, that the obligor cannot discharge the arbitrament, but that he shall forfeit his bond; and the book gives the reason, which is the cause of this resolution, *scilicet*, (d) because I am bound to stand to his award, *scilicet*, "to stand to his award," which I do not when I discharge the arbitrator. The other reason is, because now the obligor has by his own act made the condition of the bond (which was indorsed for the benefit of the obligor, to save him from the penalty of the bond) impossible *to be performed, and by consequence his bond is become (e) single, and without the benefit or help of any condition, because he has disabled himself to perform the condition (n). *Vide* (f) 21 Ed. 4. 55 a. *per* Choke, (g) 18 Ed. 4. 18 b. and 20 a. If one be bound in a bond, with condition that the obligor shall give leave to the obligee for the space of seven years to carry wood, &c. in that case, although he gives him leave, yet if he countermands it, or disturbs the obligee, the bond is forfeited. And afterwards judgment was given for the plaintiff.

3d. Point.

(a) Antea 82 a.
Fitz. Arbit. 12.
Br. Arbit. 4.
(b) 1 Brown. 62.
2 Brownl. 290.
March Arb.
165, 166.

(c) Antea 82 a.
Mar. Arb. 164.
1 Roll. 331.
Br. Arbit. 35.

(d) Mar. Arb.
165, 166.

[* 83 a.]
(e) 2 Brownl.
290.

(f) 5 Co. 21 a.
(g) 1 Brownl.
62.
Br. Condit. 163.
Touch. 391.

(n) Accordingly where two parties entered into an agreement to refer a dispute to the arbitration of C. S. and bound themselves mutually in a penalty, "for the true and faithful observance and performance" of the award to be made by C. S., it was held that the penalty was incurred by a revocation of the submission. Abbott, C. J., observed, in delivering the judgment of the Court, that the second reason in Vynior's

case was clearly applicable to the present; and further observed that the distinction drawn between the different words cited, ("observe, perform, fulfil, and keep," &c. and "stand to and abide," &c.) was extremely nice and subtle, and that he could not discover any real and substantial difference between them. *Warburton v. Storr*, 4 Barn. and Cress. 103.

SIR RICHARD PEXHALL'S CASE.

[83 b.]

Trin. 7 Jac. 1. Rot. 3649.

P. seised of lands in fee held in socage, and of other lands held in fee of the Queen by knight's service *in capite*, devised to M. a hundred sheep, and ten bullocks, and ten pounds issuing, and payable out of all his lands and tenements quarterly, &c. Held the devise is good to charge two parts of the land, and void for the residue.

BARTON
v.
MOORE.
Pt. VIII.—83 b.

The devisee has an estate for life in the said rent of ten pounds.

The words *payable quarterly* refer to the rent only. Vide the Entry, Co. Ent. 555. nu. 7.

In a second deliverance brought by Eustace Barton against Nicholas Moore, for taking of his cattle the 17th of April, anno 5 Jacobi regis, at Broxhead, in the county of Southampton, in a place called Gate. The defendant avowed the taking, because Sir Richard Pexhall, Knt. was seised of the manor of Broxhead, in the said county, (whereof the place in which, &c. was parcel) in fee; and held it of the Bishop of Winchester in socage, as of his manor of Sutton, and was also seised of the manors of Beanraper, Cranes, Chinham, Steventon, and divers other manors, lands, and tenements, and of a house in London devisable by custom in fee, and held the said manor of Steventon of the Queen by knight's service *in capite*, and being so seised, made his will in writing, and thereby devised to Eleanor his wife the said house in London, and two parts of the other manors, lands, and tenements, for thirteen years, and added a proviso that the said devise should not be prejudicial to any estate, title, or interest for year or years, life or lives, which should be after devised in the same will; and after in the same will, *dedit et legavit eidem Nicholao Moore consanguineo suo 10l. exeun' et solubil' de et ex præd' messuag' et de et ex præd' duabus partibus maneriorum et cæterorum tenementorum præd' quarterly, ad maxime usualia festa, et pro non solutione inde, ad distring' et districtiones detinend' quousque, &c.* And that the said Sir Richard being so seised, died seised, &c. and for 20l. for two years ended anno 16 Eliz. he avowed, and averred the value of the said manors and tenements aforesaid, at the time of the will, &c. to be 200l. *per ann.* above all reprisals; and it appears by the bar to the avowry that the words *of the will were, "I will and bequeath to dame Eleanor my wife all my manors, lands, tenements, &c. for the term of thirteen years next after my decease: provided that this gift, devise, and bequest, made to the said Eleanor, shall not be prejudicial

O. Bridgm. 105.

[* 84 a.]

“to any of the estate or estates, titles, or interests, for year or years, life or lives, that shall be hereafter in this present will given or bequeathed.” And further in the same will devised, “Item, I give and bequeath to my cousin Nicholas Moore a hundred sheep, and ten bullocks, and 10*l.* issuing and payable out of my lands and tenements quarterly, at the most usual feasts, and for non-payment to distrain, and the distress to detain, until he be satisfied of the arrearages, and to keep the court and courts of all my manors, upon lawful request to the said Nicholas, by him or his deputy, during his life, and when the said Nicholas shall think it most convenient and mete, to keep.” And upon the whole record, the questions which arose out of this part of the will, were two:—1. If Sir Richard Pexhall had power, by the act of 34 H. 8. cap. 5. to devise this rent of 10*l.* to Nicholas Moore, out of all his lands (A)? 2. What estate Nicholas Moore had in the rent?

Co. Lit. 111 b.

As to the first it was objected, that Sir Richard Pexhall had not pursued the power which the said act of 34 H. 8. gave him; for the words of the act are, “That every one, &c. may devise any rent, common, or other profit, out of the same two parts, (viz. out of his manors, lands, tenements, and hereditaments in three parts to be divided) or out of any part thereof, or as much thereof as shall amount to the full clear yearly value of two parts thereof:” and the sole question depends upon the said clause of 34 H. 8. for the statute of 32 H. 8. gives no power to the owner of the land, to devise rent, common, or other profit out of it: and in this case, where Sir Richard had a power to devise a rent, &c. out of two parts, by that act, he has devised a rent out of all his lands, and so has not pursued the authority which the act gave him, and the clause of 34 H. 8. which follows next after the said branch of the act, by which it is enacted, “That by the authority aforesaid, the said will so declared, shall be good and effectual for two parts of the said manors, lands, tenements, or hereditaments, although the will declared be made of the whole, or of more than of two parts,” extends only to a devise of the land itself, and not to any rent, common, or profit out of it, as appears by the letter thereof, and by all the subsequent branches concerning the division; and this clause is an explanation of the act of 32 H. 8. when all is devised; but, as hath been said, the power to devise a rent, &c. out of the land, is only given by the stat. of 34 H. 8. And the opinion in Butler and Baker's case, in the Third Part of my Reports, 33 a. was cited, where *it is said, that if a man (a) seised of three acres, (held by knight's service) each of the yearly value of 12*d.* and he devises a rent of 3*s.* out of these three acres, this devise is void for the whole, because he doth not pursue the power which the statute prescribes: but in such case, if he devises a rent of 3*s.* which is the value of

[* 84 b.]
(a) 3 Co. 33 a.
Hob. 80.
Co. Lit. 111 b.

(A) Since the stat. 12 Car. 2. c. 24. the restrictions of 32 and 34 H. 8. have become inoperative; and the power of disposition by

will of freehold lands of inheritance is general, and not confined. Vide notes to *Butler and Baker's case*, Vol. II. p. 87. *et seq.*

all, out of two parts, it is good, because in that case, the value extends to the land, and not to the rent; for the words are, *any rent*, without any restraint. As to that it was answered and resolved by the Court, that it is true, that the statute of 32 Hen. 8. doth not extend to a devise of any rent, &c. out of the land, but the power as to that, is given by the statute of 34 H. 8. which has four distinct branches as to this point,—

1. That every one having a sole estate in fee-simple, &c. “of and in any manors, &c. and having no manors, &c. holden of the King, or of any other person by knight’s service, shall have full and free liberty, power, and authority to give, dispose, will, or devise, &c. all his manors, &c. or any rent, common, or other profit, out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure, any clause in the said former act notwithstanding.” By this branch it appears, that he who has no lands held by knight’s service, may devise any rent, common, or profit, out of his lands whereof he is seised in fee, to what value he will, although the rent, common, or profit, exceeds the value of the land; for the words are, *at his own free will and pleasure*. The second branch is, when any is sole seised of any manors, &c. held of the King *in capite* “by knight’s service, shall have full and free liberty to devise, &c. by his last will in writing, &c. two parts of all his manors, &c. or any rent, common, or profit, out of, or to be perceived of the same two parts, or out of any parcel thereof in three parts to be divided, or as much thereof as shall amount to the full and clear yearly value of two parts thereof, in three parts to be divided at his own free will and pleasure.” The third branch is, “That all and singular person and persons having a sole estate in fee-simple, &c. of and in any manors, &c. holden of the King by knight’s service, and not in chief, or holden of any other person by knight’s service, shall have full and free liberty to devise, &c. by his last will and testament in writing, &c. two parts of the said manors, &c. or any rent, common, or other profit out of, or to be perceived of the same two parts, or out of any parcel thereof in three parts to be divided, or as much thereof as shall amount to the full and clear yearly value of two parts thereof in three parts to be divided at his free will and pleasure.” The 4th branch is, “And that the said will so declared shall be good for two parts of the said manors, &c. although it be declared of the whole.”
- *And also for the whole of all other such manors, &c. not holden by knight’s service, and of any rent, common, or other profit, out of, or to be perceived of the same, or out of any parcel thereof, at his free will and pleasure.” By all which branches it appears, that it is chiefly for the benefit of the King or lord (of whom the land is held by knight’s service, &c.) that the owner of the land has power by his will to charge but two parts, and by consequence it tends to the benefit of the heir; for in case when there is not any tenure to draw wardship, &c. there the owner may, at his free will and pleasure, charge the whole. Then in the case at bar where the manor of Steven-

The devise is good to charge two parts of the land, and void for the residue.

[*85 a.]

(†) Co. Lit.
111 b.

(a) 5 Co. 115 a

(b) 1 And. 3, 4.
Plowd. 564 a.
B. N. C. 486.
3 Co. 33 a b.
Br. Testam. 26.
N. Bend. 49, 50.
pl. 88.
Dy. 150. pl. 86.
1 Leon. 76.
3 Leon. 29.
Jenk. Cent. 115.
Dyer 126.

(c) Plowd. 68
b.

[* 85 b.]
The devisee has
an estate for
life in the rent.

(d) 7 Ass. pl. 1.
1 Roll. 845.
Plowd. 152 b.
Cr. El. 330.
Br. Estate 30.
Perk. sect. 104.
Co. Lit. 42 a.
3 Bulst. 194.
(e) 3 Bulst. 194.
(f) Wing. Max.
12. Lit. Rep.
66, 67.

ton was held of the King in chief by knight's service, Sir Richard had (†) power to charge but two parts; yet when he charged the whole, he charged two parts and more, and therefore it shall be good for so much as the statute enables him, and void for the residue, *quia (a) quando plus fit quam fieri debet, videtur etiam ipsum fieri quod faciendum est*; but forasmuch as Sir Richard had power by his will to charge but two parts, the charge of the whole is void for the third part, not only as to the King, or other lord, but as to the heir also, because, as to the third part, the will remains at the common law, which was utterly void; and according to this judgment, and for the same reason it was adjudged, M. 3 & 4 Ph. & Mar. in com' Banco, Rot. 126. in (b) Umpton and Hide's case, that a will in writing after the statute of 32 H. 8. and before the statute of 34 H. 8. declared of the whole land, whereof part was held of the King by knight's service *in capite*, was good for two parts: and so it had been if the statute of 34 H. 8. had never been made, which is all one in reason with the case at bar; and by this construction the true intention, as well of the testator in his will, as of the said acts of parliament, without prejudice to any, is well observed: and there is a difference between the common case of licence, and the case at bar. For if the King (c) licenses one to alien two parts of his manor of D. which is held of him *in capite*, and he aliens the whole manor, he has not pursued the licence, for by his alienation the whole manor passes; which is not according to his licence: but when an act of Parliament authorizes the owner of land held *in capite*, to charge two parts thereof, which he could not do by the common law, in this case, if he charges his whole land, it is merely void for the third part, and therefore he has well pursued the authority which the statute has given to him, to charge two parts. So if a man has the moiety of the manor of D. known by the name of the manor of D. and the King licenses him to alien the moiety of the manor and he aliens the manor, he has well pursued the licence, for in truth nothing passed but the moiety, and so you will better understand the law, amongst the various opinions. *Obiter* in Plow. Comm. 68 b. and in Butler and Baker's case.

* And as to the second point, it was agreed *per totam cur'*, that he had an estate for life in the said rent of 10*l.* *per ann.* 1. Because if it had been in a grant, the grantee should have it for life: for if a man by his deed grants a rent of 10*l.* issuing and payable out of all his lands quarterly at the usual feasts, and for non-payment to distrain for the rent, and all the arrearages, in that case the grantee shall have the rent (d) for life: also in respect thereof, he ought to hold the (e) courts of all his manors for his life, *et officium et feodum sunt concomitantia*, and he shall have the like estate in fee, as he has in the office. But it was objected, that then the devisee should have also 100 sheep and bullocks yearly for his life, as well as the rent: *quod fuit negat' per tot' cur'*, and that for two causes: 1. The second (f) (*Et*) in the said sentence, disjoins and severs the rent from the sheep and bullocks; as in the case 9 Ed. 4. 43 b.

where two were bound to stand to the arbitrament of I. S. *de (a) omnib' actionib' personalibus sectis et querelis*, this word (*personalibus*) shall be referred to all: but if the words were, *de omnibus actionibus personalibus et sectis et querelis*, it shall be otherwise; for there the last (*et*) disjoins *querelis* from the whole first part of the sentence, and shall be taken generally, without any reference to *personalibus*. So in the case at bar, when Sir Richard devised 100 sheep and 10 bullocks, and 10*l*. the last (*et*) disjoins the rent from the sheep and 10 bullocks: 2. These words (*payable*) (*b*) (*quarterly*) at the usual feasts ought to have reference to the rent, for 10 bullocks *per ann.* cannot be delivered quarterly. And judgment was given for Nicholas Moore the avowant.

(a) Roll. Arbit.
D. 6, 7.
Lit. Rep. 63.
Fitz. Arbit. 16.
March Arb. 172.

The words payable quarterly refer to the rent only.
(b) Lit. sect. 66, 67.

BUCKMERE'S CASE,

[* 86 a.]

Mich. 7 Jacobi I.

B. having three daughters, M. T. and C., gave a house to M. in tail, remainder as to one moiety to J. in tail, and as to the other, to C. in tail, with cross remainders between J. and C.; M. discontinued and died without issue, afterwards J. died without issue, C. died, and the right of the said tenements descended to G. and others: held in a *Formedon* the demandants may demand the several remainders by one writ.

In real actions, which are founded upon title, the demandant, where there are several tenures, is driven to several writs.

Unless where the foundation of the several estates is one, and at one time, and as out of one root.

In actions real which are founded upon a tort or deforcement, and do not comprehend any title in them, the demandant may in one writ demand divers lands and tenements, which come to him by several titles.

In personal actions the plaintiff may comprehend several wrongs, and several causes of actions.

Note, *If a remainder be executed, the demandant in a writ of *Formedon* in the descender, shall not speak of this remainder, but the general writ of *Formedon* in the descender shall serve, and he shall count of an immediate gift; for he cannot have a *Formedon* in the remainder, when the remainder is once executed.*

*If a man brings a *Formedon* in reverter or remainder as heir, the omission of the eldest son who survived the father, or the like in the pedigree of him in the remainder, on the part of the donor, shall abate the writ; but of the part of the donee, although the donee had many issues in lineal descent inheritable to the estate-tail, and who held the estate, the demandant need not name any of the issues in the clause *et quæ post mortem*; but shall say, *et quæ post mortem* of the donee *ad ipsum reverti debet, eo quod* the donee died without issue.*

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Pl. VIII.—85b.

*In a *Formedon* in the descender, the demandant ought to make mention of every one to whom any right descended.*

*In a *Formedon* in the descender, the demandant ought always to make himself son and heir, or cousin and heir to him, who was last seised by force of the tail; for a later cousin of any heir in tail shall abate the writ.*

He who was last seised ought to be made heir in tail to the donee, or otherwise the writ is vicious; and it is not sufficient that he be named son, for he may be son and not heir.

The surest way is for the demandant to make every one he names in the writ to be son and heir in the writ, although they were never seised by force of the tail; for it is not material, although he names them heirs, whether they were seised or not. S. C. 2 Brownl. 274.

Vin. Ab.
Form. M. p. 10.

Roscoe on real
actions 55, et
seq.

Com. Dig.
Plead. 3 F. 3.

IN a *Formedon* (A) in remainder, brought by George Buckmere, Oliver Fowler, William Buckmere, Christopher Buckmere, and Nicholas Buckmere, against Robert Sayer, and Ursula his wife, of a house in the county of Kent, of the nature of gavel-kind, the case was such: Thomas Bole had issue three daughters, Marion, Johan, and Catharine, and gave the said house to Marion, and the heirs of her body begotten; the remainder of one moiety of the said house to Johan, and to the heirs of her body begotten, and the remainder of the other moiety to Catharine, and to the heirs of her body; and if the said Johan should die without issue, the remainder of her moiety to Catharine, and to the heirs of her body, with the like remainder for want of issue of Catharine to Johan: and afterwards Marion discontinued, and died without issue, *et de eadem Mariona eo quod obiit sine hærede de corpore suo exeunte remansit jus* (which proves she discontinued, for otherwise it should be *tenementa præd' remans' unius medietatis tenementorum præd' cum pertine' per formam, &c. præd' Johanne Bole; et remansit jus alterius medietatis eorundem tenementorum cum pertinentiis, per formam, &c. præfat' Catharine Bole*, and afterwards Johan died without issue, by which the right of her moiety remained to the said Catharine, and after the death of Catharine, *descendit jus integrorum tenementorum istis Georgio, &c.* and the tenants demurred in law on this account, because the demandants demanded by one writ of *Formedon* several remainders where the demandants ought *to have demanded the several remainders by several writs. And because we must shew in what cases the demandant or plaintiff shall join divers causes of action in one and the same writ against the tenant or defendant, it must be observed, that there is a difference between actions real and actions personal, and between actions real which are founded on a title in the writ,

(A) Writs of *Formedon* in descender, remainder and reverter of any manors, lands, tenements, or other hereditaments whatsoever, shall be sued and taken within 20 years next after the title and cause of action first descended or fallen, and at no time

after the said 20 years, Stat. 21 Jac. 1. c. 16.

A person barred of his *Formedon* is not thereby prevented from pursuing any right of entry which may afterwards accrue to him, *Hunt v. Burn*, 1 Salk. 339. 2 Salk. 421. and vid. Evans' Stat. Vol. III. p. 229.

[* 86 b.]

and actions real merely founded upon a tort or deforcement. Real actions, which are founded upon title are, as in a writ of (a) escheat, *Præcipe A. quod reddat B. 10 acras terræ, &c. quas C. de eo tenuit, et quæ ad ipsum B. reverti debent tanquam escaeta sua, eo quod præd' C. obiit sine hærede.* So (b) the *Cessavit*, *Præcipe A. quod reddat B. unum messuagium quod idem A. de eo ten' per certa servitia, et quod ad ipsum B. reverti debet, &c. eo quod idem A. in faciend' servitia per biennium jam cessavit.* So the writ of ward, and the writ of mesne, and the writ of *Formedon* in descender, remainder, and reverter. Then suppose, that B. before the statute of (c) *Quia emptores terrarum*, had by one deed enfeoffed A. of Black Acre, to hold by fealty and 3d. and by another deed had enfeoffed him of White Acre, to hold of him by fealty and 6d. and afterwards A. had died without heir, B. should not have one writ of (d) escheat of these two acres; for the writ shall say, *Præcipe C. quod reddat B. duas acras, &c. quas A. de eo tenuit*, which shall be intended one entire tenure; and therefore in such case the demandant is driven to several writs upon the two several tenures; and therewith agrees 21 H. 7. 39 b. So, and for the same reason, upon a cesser in such case the lord ought to have (e) several writs of *Cessavit*; and therewith agrees 3 E. 3. 47 a. b. + 18 E. 3. *Cessavit* 20. (f) 10 Ed. 4. 1 b. & 2 a. (g) 10 Hen. 7. 24 a. So upon several tenures the tenant shall have several writs of mesne against the mesne, and shall not join them in one writ; and therewith agrees (h) 2 H. 5. 2 b. And one shall not have one writ of ward of the body and land upon several tenures, as it is held in 6 E. 3. 48 a. b. 3 H. 6. 53. 17 H. 6. Gard. 117. But a writ of ward of land was founded upon two several tenures in 46 E. 3. tit. Brief 619. but there it is held, that if he had demanded the body, the writ should have abated. Then suppose B. by one deed gives the manor of D. to A. and to the heirs of his body, and afterwards B. by another deed gives 50 acres of land to A. and to the heirs of his body, and afterwards A. dies without issue, the donor upon these two distinct gifts shall not have one writ of *Formedon* in reverter, supposing *Quod idem B. dedit prædict' manerium et quinquaginta acras terræ cum pertinentiis eidem A. et quæ ad præf' B. reverti debent, &c.* no more than upon several feoffments, *ut supra*, and tenures reserved, he shall have one writ of (i) escheat, or one writ of (k) *Cessavit*; both which *writs suppose, *quod tenementa prædicta reverti debent.* So of two several distinct gifts to one, with several remainders over to one, he shall not have one writ of *Formedon* in remainder, nor the issue of such a donee one writ of *Formedon* in descender, for the foundation of these writs is the gift which is distinct and several; and therefore in such cases, upon the several foundations, there ought to be several writs founded. But if land be given to a man, and to his sister, and to the heirs of their bodies issuing, in that case they are joint-tenants for life, and have (l) several inheritances, *sc.* the brother one

of the several estates is one and at one time, and as out of one root. (l) Co. Lit. 184 a. 18 E. 3. 39 a. b. 7 H. 4. 16 b. Br. Tail 9. Br. Estate 11. Br. Deraignm. 13. 5 Co. 8 a. 1 Leon. 213. Vin. Ab. Moieties, A.

In real actions which are founded upon title, the demandant, where there are several tenures, is driven to several writs.

(a) F.N.B. 144. e. f. Reg. Orig. 161 b.

(b) F.N.B. 203. li.

2 Inst. 401, 402.

(c) 2 Inst. 500, 501, &c.

(d) Br. Escheat 13. Br. Joynder in Action 46.

(e) F.N.B. 209 b. Fitz. *Cessavit* 40.

+ 18 E. 3. 48 b. *Cessavit* 20.

(f) Br. *Cessavit* 24.

Fitz. *Cessavit* 3.

(g) Br. *Cessavit* 42.

(h) Fitz. Mesn. 6.

(i) 21 H. 7. 39.

b. Br. Escheat 13. F.N.B. 209

[* 87 a.]

b. Br. Joynder en action 46.

(k) 3 E. 3. 47 a. b.

10 E. 4. 1 b. 2 a.

10 H. 7. 24 a.

Br. *Cessavit* 24,

42. Fitz. *Cessavit* 3. 18 E.

3. 48 b. *Cessavit* 20.

Unless where the foundation

moiety, to him and to the heirs of his body, and the sister the other moiety, to her and to the heirs of her body; in that case, although the inheritances were several, yet because the foundation was one, and at one time, and as out of one root, for that reason the donor shall have one writ of *Formedon* in the reverter, and therein shall shew the gift as it was to the brother and sister, &c. and conclude in the close of the writ, *quia uterque eorum obiit sine hærede de corpore*, &c. which words prove that each of them had a several right; and so is the book adjudged in Roger Dardene's case, in † 17 Edw. 3. 51 a. and 78 a. b. and 18 Ed. 3. 39 a. b. which is all one case. So, if lands be given to (a) father and son, and to the heirs of their two bodies begotten, the remainder over in fee, and afterwards the father dies without any issue but the son, and afterwards the son dies without issue. and a stranger abates, he in the remainder shall have one *Formedon* in the remainder, although the estates tail were several; yet forasmuch as well the several estates in tail and the remainder also depend upon one joint estate in the father and son for their lives, and all begin at one time, for this reason one *Formedon* in the remainder lies. So in the said case of (b) 17 Edw. 3. if land had been given to brother and sister, and to the heirs of their two bodies begotten, the remainder over in fee, if the brother dies without issue, now the sister has an estate for life in one moiety, the remainder over in fee, and for the other moiety an estate tail, the remainder in fee, and afterwards the sister has issue and dies, and a stranger abates, now for one moiety the remainder begins, and after the issue dies without issue, although the remainder falls at several times, yet he in remainder shall have one *Formedon* for both remainders, which depend upon one and the same estate, come to one and the same person. And so is the book to be intended in (c) 31 Hen. 6. 14 b. where it is said, a man may have one *Formedon* of divers gifts. *Vide* 44 Ed. 3. tit. Tail 13. a good case, and 50 Edw. 3. tit. Feoffments and Ffaits, 97. and 7 Hen. 4. 88.

† 1 Leon. 213.

(a) Dyer 145.
pl. 64.
1 Leon. 213.

(b) 17 E. 3. 51
a. 78 a. b.

(c) Fitz. Brief.
113. Post. 65
b.

[* 87 b.]
(d) 2 Brownl.
275. S. C.

*So it was (d) resolved in the case at bar, that when the whole is devised to Marion in tail, although the devisor divides the remainders by moieties; yet, when the whole land remains to Catharine, and all the remainders depend upon one estate, and begin by devise at one time, the heirs of the body of Catharine shall have one *Formedon* in the remainder, in the same manner as if the remainder had been limited to Catharine and Johan, and to the heirs of their two bodies, the remainder for default of issue of Johan to Catharine, and to her heirs for ever.

In actions real which are founded upon a tort or deforcement, and do not comprehend any title in them, the demandant may in one writ demand divers lands and tenements which come to him by several titles. Q. Carthew 454. Com. Dig. Actions G.

But such actions real, which are founded upon a tort or deforcement, and do not comprehend any title in them, there, the demandant may demand in one writ divers lands, and tenements, which come to him by several titles: as if divers

lands and tenements which come to him by several titles. Q. Carthew 454. Com. Dig. Actions G.

manors descend to me from several ancestors, and I am disseised or deforced of them, I may have a writ of right, or a writ of entry in the nature of an assise, or a writ of assise, and comprehend all these rights in one and the same writ, because in these cases no title is made in the writ. *Vide* L. 5 Ed. 4. 80. 12 Ed. 4. 1 a. 17 Ed. 3. 52. 17 Ass. 10. 12 Ed. 3. Ass. 112. 22 Ass. p. 52, 66. 7 Ass. p. 18. 7 Ed. 3. Assise 138. 15 Ed. 3. Charge 9. 15 Ass. pl. 11. But if I bring a writ of entry on a disseisin done to my mother or aunt coparceners in fee-simple, the writ shall abate, for here title is made in the writ; and it appears that there were several causes of action, because the title is by several ancestors, and therewith agrees the book in (a) 31 Hen. 6. 14 b. and 43 Ed. 3. 17 a. So if an estate tail descends to two daughters coparceners, and one enters into the whole, and the other has issue, and she who enters dies without issue, in that case the issue shall have several writs of *Formedon* in the descender of one moiety of the possession of his mother, *quam insimul tenuit*, and of the other moiety of the possession of his grand mother; and therewith agrees (b) 43 Edw. 3. 16. and 17.

(a) Ante 87 a.
Fitz. Brief 113.

(b) Fitz. For-
medon 24.
Br. Formed.

54. Br. Brief. 504. 2 E. 4. 23.

And in personal actions the plaintiff may comprehend several wrongs, and several causes of actions, as one action of trespass for several trespasses committed at several days, and in several places. *Vide* (c) 31 H. 6. 14 b. (d) 8 Edw. 4. 5 a. and 44 Edw. 3. 34. 14 Hen. 8. 12 b. F. N. B. 60. An action (e) of waste upon several leases, for in the prohibition of waste at the common law against tenant in dower, &c. damages were only recovered, which * was in the personality: so of debt (f) upon several leases.

In personal actions the plaintiff may comprehend several wrongs and several causes of actions.

(c) Fitz. Br. 113.

[* 88 a.]

(d) Fitz. Tres.

116. (e) F. N. B. 60 f. Cro. Jac. 330. Popham 25. Com. Dig. Actions G. (f) 31 H. 6. 14 b. Yelv. 63. Fitz. Br. 113. 8 E. 4. 5 a. Mo. 914. Fitz. Tresp. 116. Cr. Jac. 68. Noy 3. 1 Brownl. 86, 87.

Note, reader, as to the bringing of writs of *Formedon*, these differences: 1. If a remainder be executed in a writ of *Formedon* in the (g) descender he shall never speak of this remainder, but the general writ of *Formedon* in the descender shall serve in that case, and he shall count of an immediate gift; for he cannot have a *Formedon* in the remainder, when the remainder is once executed. But if a lease for life be made, the remainder in tail to A. the remainder in tail to B. if A. dies without issue in the life of the tenant for life; if B. be driven to his *Formedon* in the remainder, in his *Formedon* he ought to mention the remainder to A. although it was determined and spent, as is aforesaid. For the demandant in the *Formedon* in the remainder ought to make (h) mention of all the precedent remainders in tail, 8 Ed. 3. 19 a. b. 38 Ed. 3. 26 a. b. + 44 Ed. 3. 8 a. 50 Ed. 3. 1 b. 11 H. 4. 39 a. the remainder, when the remainder is once executed. (g) 1 Mod. Rep. 219, 220. Palm. 224. F. N. B. 219 a. b. d. Reg. Orig. 244 a. 3 Mod. 253. Booth 152. (h) Hob. 282. + Fitz. Formed. 26, 28. Br. Formed. 14. Booth. 153.

If a remainder be executed, the demandant in a writ of *Formedon* in the descender, shall not speak of this remainder, but the general writ of *Formedon* in the descender shall serve; and he shall count of an immediate gift, for he cannot have a *Formedon* in

(g) 1 Mod. Rep. 219, 220. Palm. 224. F. N. B. 219 a. b. d. Reg. Orig. 244 a. 3 Mod. 253. Booth 152. (h) Hob. 282. + Fitz. Formed. 26, 28. Br. Formed. 14. Booth. 153.

If a man brings a *Formedon* in reverter or remainder as heir, the omission of the eldest son who survived the father, or the like in the pedigree, of him in the remainder, on the part of the donor shall abate the writ: but of the part of the donee, although the donee had many issues in lineal descent inheritable to the estate tail, and who held the estate, the demandant need not name any of the issues

[* 88 b.] in the clause *et quæ post mortem*, but shall say *et quæ post mortem* of the donee *ad ipsum reverti debet*, *co quod* the donee died without issue.

In a *Formedon* in the descender, the demandant ought to make mention of every one to whom any right descended.

a) F.N.B. 220 d. 18 E.3. Fitz. Formed. 59. Booth 155. Carth. 128. Lucas 362. 9 Co. 61. † Dy. 216. pl. 56.

In a *Formedon*

in the descender the demandant ought always to make himself son and heir, or cousin and heir to him who was last seised by force of the tail, for a later seisin of any heir in tail shall abate the writ. (c) Hob. 51, 52. F.N.B. 212 b. Booth 144. Com. Dig. Placader 3 E. 2.

18 Hen. 8. 4. F. N. B. 219. Vide Register 239 b. and 243 b. and 244 a. *brevia nunquam faciunt mentionem de remanere quando breve est* in the descender. 2. If a man brings a *Formedon* in (a) reverter or remainder as heir, the omission of the eldest son who survived the father, or the like in the pedigree, on the part of the donor, of him in the remainder, shall abate the writ; but of the part of the donee, although the donee had many issues in lineal descent inheritable to the estate tail, and who held the estate, the demandant need not name any of the issues in the clause *et quæ post mortem*; but shall say, *et quæ post mortem* of the donee *ad ipsum reverti debet*, *co quod* the donee died without issue; and that for two reasons: 1. Because the demandant is a stranger to the pedigree of the donee. 2. Because if the issue shall be supposed by the writ to die without issue, yet it may be that the estate-tail is not spent, for the issue may have brothers, or cousins inheritable to the donee, and the land ought not to revert to the donor so long as the estate tail continues. And in some old written Registers the clause is, *co quod* the issue died without issue. But the printed Register, which imitates the most ancient and most true precedents; *et quod post mortem* if the donee *reverti debet*, *co quod* the donee died without issue, and therewith agree 22 Hen. 6. 36. by the Justices, 4 Eliz. † Dyer 216 by the Justices, and 28 Hen. 8. Dyer 14, 16. Vide 18 Edw. 3. 42. 26 Edw. 3. 75. 25 Edw. 3. 44. 42 Edw. 3. 20. 44 Edw. 3. 40. *10 Edw. 3. 35 Edw. 3. droit 30, 47. 11 Edw. 2. *Formedon* 58, 59. Register 239 a. b. 3. In a *Formedon* in the (b) descender, the demandant (because he is privy, and ought to know his pedigree and descent) ought to make mention of every one to whom any right did descend; as after a discontinuance made by the father, if the elder son survived his father, and died without issue, yet the younger brother ought to make mention of him in a *Formedon* in the descender, otherwise if the elder brother died without issue in the life of the father: *a fortiori* he ought to make mention of every heir in tail who held the estate; that is, who was seised by force of the tail: but observe also therein a difference; for if any of the heirs in tail survive their father and hold the estate tail, he ought to be named in the writ son and heir; but if he survives, and dies before he was seised, he need not name him heir, but may name him son only, *et quod post mortem præd' D. et E. filii ejusdem D. et E. filii et hæredes præd' D., &c.* So is the writ when the elder son doth not enter, and when the younger son enters and is seised. Vide Register 238 b. F. N. B. 212 f. 10 E. 3. 49, 50. 44 E. 3. 21, 40. 4 E. 2. *Formedon* 48. 11 E. 2. *ibid.* 56. 46 E. 3. 9. 6 E. 3. 261. 8 E. 3. 379. 11 H. 4. 72 b. (b) Cr. El. 842. Cr. Car. 435. Cr. Jac. 412. Hob. 61, 52, 282. F. N. B. 220 d. Rusc. 175.

4. In a *Formedon* in the descender, the demandant (c)

ought always to make himself son and heir, or cousin and heir to him who was last seised by force of the tail, for a later seisin of any heir in tail after shall abate the writ. 2. He who was last seised ought to be made heir in tail to the donee, or otherwise the writ is vicious; and it is not sufficient that he be named son, for he may be son and not heir. But the surest way for the demandant, is to make every one he names in the writ to be son and heir in the writ, although they were never seised by force of the tail; and it is not material, although he names them heirs whether they were seised or not, and thereby the demandant will be certain to make himself heir as well to the donee *per formam doni*, as to him who was last seised. And therewith agree (a) 22 H. 6. 36 a. 8 H. 6. *Formedon* 4. 11 H. 6. 20. 8 E. 3. 11. 10 E. 3. 49. 27 Ed. 3. 81. 31 Ed. 3. 29. 48 E. 3. 7. 49 Ed. 3. 21. Reg. 238. F. N. B. 212. And note, in the *Formedon* in descender there is the clause *et quod post mortem, &c.* and then the descent, and no clause, *de eo quod, &c.* for that serves most convenient when the estate tail is spent, which serves well in *Formedon* in the reverter and remainder, but not in descender, unless in special cases. And so by these differences, and the reason* of them, you will better understand your books.

for it is not material, although he names them heirs, whether they were seised or not. B. 212 f. (a) Br. Form. 37.

He who was last seised ought to be made heir in tail to the donee, or otherwise the writ is vicious; and it is not sufficient that he be named son, for he may be son and not heir.

The surest way is for the demandant to make every one he names in the writ to be son and heir in the writ, although they were never seised by force of the tail,

[* 89 a.]

† F. N.

Note in the case at bar, although the heirs of the body of Catharine claim the remainder by descent, yet forasmuch as Catharine was never seised in possession of the estate tail, but only of the remainder; for this cause the writ should say, *remanere debet*, and not, *descendere debet*: for the writ shall never say, that the thing ought to descend to one as son and heir, if the ancestor was not seised, by the rule in the Register 241. a. b.

If the ancestor was not seised, the writ shall never say *debet descendere*.

FRAUNCES'S CASE,

Mich. 7 Jacobi 1.

In replevin, the defendant avowed taking the cattle damage feasant. The plaintiff pleaded in bar a devise to one I. of the lands in which, &c. for sixty years, who demised them to the plaintiff for one year. The defendant replied, a feoffment in fee after the making the will, to the use, amongst other uses, of the said I. for sixty years after the death of

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the devisor, with a proviso, if the said I. should disturb T. and others, &c. so that they could not quietly enjoy the tenements the devisor conveyed to them, &c., or if the said I. should not permit the executors of the said devisor to have and remove, &c. all the goods and chattels, &c. of him the said devisor, which should then be in his mansion house, or if he should do any thing to impede and frustrate the intention of the devisor expressed in his will, the use should cease and be void. And further pleaded, that I. entered into a house where certain goods of the devisor were, and took them; and that the executors came and requested the said I. to let them take away the said goods, but that the said I. would not permit the executors to take them away: but that he altogether prevented and hindered them from so doing; and then the defendant concluded his replication by averring that the said use to I. ceased. On demurrer, judgment was given for the plaintiff. And resolved,—1. The words of the proviso are sufficient, to make the use limited to I. for years, cease. 2. A denial by parol is not any breach of the condition, but there ought to be some act done; as after request made by the executors shutting the door against them, or laying his hands upon them. 3. If the defendant had shewed a special act of disturbance against the words of the proviso, yet the said I. should not lose his term, for being a stranger to the feoffment, notice ought to be given to him of the proviso and of the will. 4. Although the title by which the plaintiff claims in his bar to the avowry is destroyed, yet he shall have judgment by reason of the title which the defendant has given him.

The feoffee of land or bargainee of a reversion by deed indebted and enrolled shall not take advantage of a condition for nonpayment of rent reserved on a lease, upon demand by them; unless they have first given notice to the lessee of the feoffment, &c.

If there be a bargain and sale of a manor by deed indented and enrolled, and a copyholder before any notice given to him of the bargain and sale refuse to pay his rent to the bargainee, it is not a forfeiture of which the lord can take advantage.

If a feoffment be made on condition that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor if the husband dies, living the wife, the feoffee ought to make the estate to the wife, &c. as near the condition and as near the intent of the condition as he can make it, viz. to the wife for life, without impeachment of waste, and after her decease to the right heirs of her husband and her begotten, remainder to the right heirs of her husband.

When a man binds himself to perform the award of a stranger, it is not necessary to give him notice that the stranger has made his award. S. C. Brownl. 277.

[*89 b.]

3 Bulst. 327.
Cart. 172. 1
Roll. 430, 431.

*In a replevin between Richard Milner, plaintiff, and Thomas Fraunces, defendant, which began *Mich. 6 Jacobi, Rot. 2220*, of his cattle taken at Bloxwich in the county of Stafford, in a place called Newland, the defendant did avow the taking of the cattle in the place where which contained six acres, &c.

because it was his freehold, and so did avow for damage†. † 6 Mod. 158.
 The plaintiff in bar to the avowry pleaded that one Richard Fraunces was seised of the said six acres in fee, and held them in socage, and 7 December 45 Eliz. by his will in writing (whereof he made Richard, Edward, and James his sons his executors) devised them to John Fraunces his eldest son for the term of sixty years, if the said John should so long live, the remainder thereof to the said Thomas Fraunces for his life, the remainder to the heirs males of the body of the said John Fraunces, the remainder to the heirs males of the body of the said Thomas with divers remainders in tail to his other sons, the remainder to the right heirs of the devisor: and afterwards, 30 Jan. next following, the devisor died, by which John Fraunces entered into the said six acres, and was thereof possessed, and 25 Martii, 5 Jac. demised the said six acres to the plaintiff for one year next ensuing, wherefore he put in his said cattle, &c. In answer to the bar of the avowry the said Thomas Fraunces said, *that the said Richard Fraunces the father was so seised, &c. and made his will, as in the bar to the avowry is alleged. And further, that the said Richard Fraunces the father was seised in fee of twenty acres of pasture in Tibbington, and of a house and five acres of land in Dorlaston in the said county, and also of the said six acres, in which, &c. And the said Richard, the father, after the making the said will, 8 Jan. 45 Eliz. by his deed of all the said lands, did enfeoff Richard Fraunces his son, and John Alport, and their heirs, to the uses and intents following, *scil.* to the use of Richard Fraunces the father for his life; and after his death, of the lands in Tibbington, to the use of the said Thomas Fraunces and his heirs; and of the lands in Dorlaston, to the use of the said James Fraunces, his heirs and assigns; and of the said lands in Bloxwich, in which, &c. to the use of the said John Fraunces for sixty years after the death of the said devisor, if the said John so long should live; and after to the use of the said Thomas for life; and after to the heirs males of the body of the said John; and afterwards to the heirs males of the body of the said Thomas, with divers other remainders in tail to his other sons; the remainder to the right heirs of the feoffor, with this proviso in the deed: *et ulterius per script' præd' (a) provisum fuit, quod si præd' Johan' Fraunces disturbaret eund' Thomam Fraunces, vel præd' Jacobum Fraunces, vel hæred' vel assign' eorum, vel alicuj' eorum, &c. Sic quod non poterint quiete habere tenere et gaudere talia terras, tenementa et hæreditamenta, qualia ipse idem Richardus Fraunces pater conceiasset eis et cui-libet vel alicui eorum, vel aliquam partem et parcellum hujusmodi terrarum tenementorum et hæreditamentorum, vel si præd' Johan' Fraunces, executores administratores sive assign' sui, &c. non permittit' executores ipsius Rich' Fraunces vel eorum assign' quiete habere, removere, capere et asportare omnia et quelibet bona et catalla ipsius Rich' Fraunces patris quæ essent et remanerent in tunc sua domo mansionali, etc. vel facerent aliquam rem*

Hard. 133.

[* 90 a.]

(a) Co. Lit.
 203 b.
 Brown. 277.
 Cart. 172. Cr.
 Car. 129. 1
 Roll. 430, 431.

[* 90 b.]

ad impendendum vel deteriorandum intentionem ipsius Richardi Fraunces patris concernen' eadem in ejus ultima voluntate et testamento expressa, quod tunc præd' usus limitat' præfato Johan' Fraunces et hæred' suis cessarent et penitus tacui essent ad omnes intentiones: and afterwards, 30 Jan. 45 Eliz. Richard the father died, and the said John entered into the said six acres, and was thereof possessed, the remainder over as aforesaid; and that the said Richard the father, at the time of the said feoffment, did dwell in a house in Bloxwich aforesaid which is the messuage mentioned in the said proviso. And that the said Richard the father was possessed of a bedstead, a table-board, and a cup-board, as of his proper goods, and died thereof possessed in the said house; *after whose death the said John entered into the said house where the said goods were, and took them, and was thereof possessed; and the said executors, 12 Feb. 45 Eliz. came to the said house, and there then would have taken and carried away the said goods, and requested the said John, *ad permittendum ipsos bona et catalla præd' capere et asportare, prædict' Johan' Fraunces adtunc et ib' non permisit ipsos execut' capere et asportare bona et catalla præd' secund' formam et effectum præd' scripti scoffamenti, sed idem Johan' ne ipsi bona et catalla præd' in eod' messuagio, ut præfertur existent' caperent vel asportarent penitus prohibuit et impedivit;* by which the said term of sixty years limited to the said John ceased: whereupon the said Thomas, as in his remainder, entered, and was thereof seised for life, &c. upon which the plaintiff demurred in law. And it was objected on the plaintiff's part, that the said proviso was utterly void to cease the use limited by the said deed to the said John, for nothing by the same deed is limited to him but for sixty years; for inasmuch as he took but a lease for years, the remainder limited to his heirs males of his body after the death of Thomas did not vest in him, but remained in contingency: otherwise if John had taken an estate for life, and the proviso made void the use and uses limited to the said John Fraunces and his heirs, where no such use was limited to him; and therefore the proviso void: and provisos and conditions which go in destruction and defeasance of estates are odious in law, and shall be taken strictly, and shall not be construed to make void any other use or estate which is not within the words of the proviso; for, (a) *conditio beneficialis quæ statum construit, benignè secund' verbor' intentionem est interpretanda, odiosa autem quæ statum destruit, strictè secund' verbor' proprietatem est accipienda:* as if a feoffment be made on such (b) condition that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor, if the husband dies, living the wife, the feoffee by

(a) Co. Lit.
218 a.

If a feoffment be made on condition that the feoffee shall give the land to the feoffor and to the

wife of the feoffor, and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor, if the husband dies, living the wife, the feoffee ought to make the estate to the wife &c. as near the condition and as near the intent of the condition as he can make it, viz. to the wife for life without impeachment of waste, and after her decease to the right heirs of her husband and her begotten, remainder to the right heirs of her husband. (b) Lit. 82 a. b. Co. Lit. 218 b. 219 a. b. Lit. s. 352.

the law ought to make the estate to the wife, &c. as near the condition and also as near the intent of the condition as he can make it (as Littleton holds, *lib.* 3. cap. Condition, fol. 82.) *scil.* to demise to the wife for term of her life, without (a) impeachment of waste (A), and after her decease to the right heirs of her husband and her begotten (B); the remainder to the right heirs of her husband: so Littleton saith there, if the husband and wife die before the deed made, &c. And therewith agrees the book in (b) 2 H. 4. 5. by all the Justices, although it was said, (c) 18 Ass. pl. ult. & 19 E. 3. *Entre conceable* 39. are contrary: but when conditions enure in destruction of estates, then they shall be taken strict; as if a man makes a feoffment in fee of certain lands, upon condition *that the feoffee shall not give the land to husband and wife, and to the heirs of their two bodies begotten, if the husband dies without issue, and the feoffee makes a lease for life to the wife, without impeachment of waste, &c. *ut supra*, it is no breach of the condition, for it is taken strict, because it extends to the destruction of the feoffment. So in the case at bar, for-

(c) 18 Ass. 18. 2 Co. 80 a. 81 a. Br. Condition 105. Post. 91 a. Co. Lit. 222 a. b. 6 Co. 74 a. 1 Roll. 438.

(a) 11 Co. 82 b.
83 a. 2 Co.
23 a. 72 a. 82
a. 4 Co. 63 a.
1 Roll. Rep.
182. Moor
18, 327. 2
Inst. 116. Hob.
132. Poph.
193, 194, 195.
Latch. 269.
270. Bridg.
[* 91 a.]
192. Dyer 47.
pl. 11. Plowd.
132 b. Cr.
Jac. 216. Co.
Lit. 219 b.
220 a.
(b) 1 Jones 181.
a. b. 6 Co. 74 a.

(A) But if the privilege of being without impeachment of waste be omitted, it shall not give the heir of the feoffor, for whose benefit it was omitted, a re-entry, which would defeat the estate of the wife. *Bingham's case*, Vol. I. p. 643. and the authorities cited in note S. 2. *ib.*

(B) In Litt. s. 352. it is said the feoffee ought to let the land to the wife, for term of life without impeachment of waste, the remainder after his (i. e. *her*) decease to the heirs of the body of her husband on her begotten, &c. *Ld. C. J. Wilmot*, in giving judgment in the case of *Frogmorton v. Wharry*, 2 Black. Rep. 728. makes the following remarks on this passage in Littleton. "When an estate is limited to husband and wife and the heirs of their two bodies, the word *heirs* is a word of limitation, because an estate is given to both the persons from whose bodies the heirs are to issue. But when it is given to one only, and the heirs of two (as to the wife, and the heirs of her and A. B.) there the word *heirs* is a word of purchase. For no estate tail can be made to one only and the heirs of that person and another. This appears from Litt. s. 352. according to the true reading collected from the original Editions. The common Editions make the estate *cy pres* therein mentioned to be to the widow, and '*les heirs de corps de son baron de lui engendres*;' which is not as near as might be to the original estate intended if the husband had lived; *viz.* to the husband and wife and the heirs of

"their two bodies. But the original Edition by Lettou and Macklinia in Littleton's life-time, and the Roan Edition which is the next (both which my brother Blackstone has) read it thus: '*les heirs de les corps de son Baron et luy engendres*, which is quite consonant to the original estate. And this estate to the widow for life, and the heirs of the body of her husband and herself begotten, Littleton in the same section declares not to be an estate-tail." Vid. n. 3. Co. Litt. 26 a.

The position in the text *suprà* seems to have escaped the notice of C. J. Wilmot; nor is it referred to by Coke in his Commentary on Litt. s. 352. It accords with the reading in the earlier editions of Littleton: but it is somewhat remarkable, that in *Lewis Bowles's case*, 11 Rep. 83 a. it is said that the estate shall be made to the wife for term of her life without impeachment of waste, the remainder to the heirs of the body of her husband of her begotten. I have compared the translation of the passage in the Eighth Report with the French Editions of 1611 and 1624, and found it correct. The translation of the passage in the Eleventh Report, as given in this note, has also been compared with the editions of that Report, in 1614 and 1627, and found correct. The case in the Year Book 2 H. 4. 5. which is also to be found in Fitz. Ab. Cond. 5. and Brook Ab. Cond. 33. throws no light on this subject.

1. The words of the proviso are sufficient to make the use limited to J. for years cease.

(a) Co. Lit. 205 b. 218 a. 219 b.
Vin. Ab. Cond. Q a.

(b) 18 Ass. 18. Antea 90 b. 2 Co. 80 a. 81 a. 6 Co. 74 a. Co. Lit. 222 a. b. Br. Cond. 105. 1 Roll. 438. (c) 2 H. 4. 5 b. 1 Co. 137 b. Br. Condit. 33. Fitz. Condit. 5. 11 Co. 83 b. 2 Co. 81 a. b. 1 Jones 181. Antea 90 b.

2. A denial by parol is not any breach of the condition, but there ought to be some act [* 91 b.] done: as after request made by the executors shutting the door against them, or laying his hands upon them.

(d) 9 Co. 51 a. 1 Roll. 430, 438. 1 Anders. 137. 16 E. 4. 10 b.

11 a. 1 Jones 169. 2 Brownl. 277. Cr. El. 219. Cr. Jac. 679. Cr. El. 694. 1 Leon. 230. (e) 1 Roll. 430, 431. Cr. Jac. 679. (f) 2 Ventr. 139. Com. Dig. Cond. N. 6 Mod. 150. See Cro. Jac. 567. Garret and Taylor. † Comyn. Rep. 228. 2 Saund. 181 a.

asmuch as the said proviso extends to the destruction of a former use and estate, it shall be taken strictly, and shall not destroy another use by construction, than that only to which in words it extends. To which it was answered and resolved by the whole Court, that it is true, that conditions or provisos which will destroy former estates, shall be taken (a) strictly: but in this case the words of the proviso were sufficient to cease the use limited to John for years, and the use limited to the heirs males of his body: for the words of the proviso are *quod tunc præd' usus limitati præfato Johan' Fraunces et hæredib' suis cessarent*. And therefore if it be asked what uses shall cease? the proviso will answer, *prædicti usus*: if it be further asked, to whom are *prædicti usus* limited? the proviso will answer, to the said John, and to his heirs. And if it be further asked, what use expressed before in the indenture is limited to John? the deed will answer, to John for sixty years. And what use beforementioned in the indenture to his heirs? the deed will answer, a remainder to the heirs males of his body: so these words (*prædicti usus*) by reference to the uses before expressed in the same deed, make the words of the proviso to be sufficient to cease the use before limited to the said John, and the said use before limited to his heirs to cease: and it is all one to say *prædicti usus* before limited to his heirs, and to say the uses before limited *prædictis hæredibus*: in both which cases this word (*prædicti*) has as strong a reference, as if the uses before limited had been particularly recited in the proviso; and *verba accipiendæ sunt cum effectu*. But note, reader, the said books in (b) 18 Ass. pl. ult. and 19 E. 3. Entr. Cong. 39. are not contrary to Littleton, and (c) 2 H. 4. in the case aforesaid: but are ruled upon another reason, *et hæc sunt diversa, et non adversa*, as it appears in the Second Part of my Reports, in the Lord Cromwell's case, fol. 80 a. where the said cases are very well, and at large explained; and, therefore, the outward semblance of discord between our books, in this and other cases, doth arise from the ignorance of the inward understanding of the said cases, and of the true reason and rule of them: for, for the most part, every particular case is adjudged upon a particular reason. 2. It was resolved, that denial by parol is not (d) any breach of the condition, but there ought to be some act done; as after request made by the executor to (e) shut the door against them, or to lay his hands upon them, and to have resisted them, or such *like acts, so that by reason of some such act, he would not suffer them to take or carry away the said goods, according to the said proviso. And Coke, C. J. held, that in such case it is not sufficient to say, *quod præd' Johan' non (f) permisit præd' executores, &c. quietè habere, remov' et cap' præd' bona*, or that *præd' Johan' imped' illos, &c.* but he ought to allege a special breach, by reason of some special disturbance or interruption in such case by some act, † to which the other party may have a certain answer, and upon which a certain issue may be taken, of which the jury may in-

quire, and the Court may judge if it be a sufficient breach of the proviso, or not; and he cited the book in 10 E. 3. 40. Roger Fannell's case, in an assise brought by John against Roger Fannell of twenty acres of land, and upon *nul tort* pleaded, the assise found this special matter, that Roger Fannell leased by deed to John the plaintiff a house and the twenty acres of land for twelve years, and in surety of his term made him a charter of feoffment (a) upon such condition, that if the lessee was disturbed within the term, that he could not have the tenements till the end of the term, that he should hold the tenements to him and his heirs for ever: and further said, that John was disturbed of the tenements by which he was seised by the manner, and prayed the opinion of the Court, and this finding was insufficient for three causes. 1. Because the recognitors have found a disturbance, and have not found by whom the disturbance was made; for if the disturbance was made by a stranger, without the assent or procurement of the lessor, the lessor shall not lose his inheritance. 2. They have not found how the disturbance was made, but generally, that the lessee was disturbed; so that the Court cannot judge that it was a disturbance to make the lessor lose his inheritance. 3. Whether and how livery and seisin were made, &c. and therefore it appears in the book, that Shard asked the recognitors,—1. By whom he was disturbed? 2. How he was disturbed? 3. If livery was made on both charters? To the first they answered by the lessor. To the second by the sale, *sc.* by feoffment in fee. To the third, on both. And thereupon John recovered *quod nota*, a very good case to this purpose. And he cited also the case in 35 H. 6. Barr. 162 (b) the master of St. Catharines leased three houses to one by indenture, on condition that he should not permit or harbour any lewd woman within the said houses, if he be warned thereof by the master, or his servant; and if she remained there six weeks after warning by the master or his servant, that then the master and his successors should re-enter: and it was shewed, that the lessee did suffer such a lewd woman to dwell there, wherefore such a servant of the master gave warning to him, (that he should not suffer her to remain;) and he would not, but suffered the said woman to continue there by the space of six weeks, wherefore the said master ousted him, &c. To which the lessee *said, that after the said warning given, the master commanded the said lewd woman to be in one of the said houses, and to continue there for six weeks after; without that, that she was continued there by the said plaintiff: and it was held by the whole Court, that that replication was not good, because the indenture is, *quod non permittat* any lewd woman to continue there: as if I am (c) bound to you, to enfeof you of one acre of land before such a day, within which time you disseise me, that is not to the purpose, for you had no colour to enter upon me, and I may re-enter and make the feoffment. So in the same case, that master had no colour to put the lewd woman into possession; for which cause the lessee might well put her out. So it is no plea, without (d) special matter shewed:

Fannell v. Fannell cited.

(a) Co. Lit. 217 a. Plowd. 34 a. 135 a. b. Fitz. Ass. 161. Br. Condit. 101. 10 Ass. 15. Plowd. 482 b. 10 E. 3. 39 b. 40 a. Hob. 35.

(b) 2 Brownl. 277. Godb. 70. Moor 404. Owen 66. Co. Lit. 206 b. 1 Roll. 454. Com. Dig. Cond. M. 5.

[* 92 a.]

(c) Cr. El. 694, 374. Moor 404. Owen 65, 66. Co. Lit. 406 b. 1 Roll. 453.

(d) Cr. Jac. 679. Cro. El. 374.

3. If the defendant had shewn a special act of disturbance against the words of the proviso, yet the said J. should not lose his term; for being a stranger to the feoffment, notice ought to be given to him of the proviso, and of the will.

The feoffee of land, or bargainee of a reversion by deed indented and enrolled, shall not take advantage of a condition for nonpayment of rent reserved on a lease, upon demand by them; unless they have first given notice to the lessee of the feoffment, &c.

(a) 1 Mod. Rep. 87. Palm. 164. 2 Bulst. 144, 277. 1 Jones 390. Cart. 93, 172. Winch. 116, 118. 3 Keb. 19. Matt. Par. f. 246. 3 Mod. 28, 29. (b) Cro. Argument, 19. (c) Cr. Jac. 193. (d) Cart. 93, 172. Cr. Jac. 617. Mod. Rep. 87. Palm. 207, 210. Godb. 162. Bridgman 130. 5 Co. 113 a. b. (e) Co. Lit. 215 b. Cr. Jac. 392. 5 Co. 113 a. b. (f) Co. Lit. 215 b. Cr. Jac. 392, 476. 2 Roll. Rep. 143. 5 Co. 113 b. Poph. 165. Latch. 15. Palm. 434. 3 Keb. 19. (g) Mod. Rep. 88. Palm. 434. Moor 426, 456. Cr. El. 533, 572, 528. 2 And. 90, 91. Hard. 48. Doct. pl. 159.

wherefore the lessee said, that the master ousted him and with force, and against the will of the lessee, put her in possession, and made her continue there with force, against the lessee's will, for six weeks, &c. and that was held a good plea. And so it is in the case of the feoffment before, such special pleading is good, *sc.* that he disseised him, and kept it with force, so that he could not enter: and these are the words, word for word of the said case: *a fortiori* in the case at bar, the said prohibition by words, without an act done by which the executors cannot take the goods, is no breach of the proviso. 3. It was resolved, that although the defendant in the case at bar had particularly shewed a special act of disturbance against the words of the proviso, that yet the said John should not lose his term; for none shall lose any estate, or interest which he lawfully has, without some act or default in himself; and, therefore, in this case, forasmuch as John the eldest son was a stranger to this feoffment, the shall not lose his estate, without (a) notice given him of the proviso, and of the will of his father (c). (b) *Quod nostrum est sine facto sive defectu nostro amitti seu ad alium transferri non potest.* And the opinion of (c) Popham, C. J. in (d) Mallorie's case, in the Fifth Part of my Reports, f. 113. that the (e) feoffee of land, or (f) bargainee of a reversion by deed indented and inrolled, shall not take advantage of a condition for non-payment of rent reserved on a lease, on demand by them, without (g) notice thereof given to the lessee; nor shall the lessor, by acceptance of rent, dispense with a collateral condition, broke by the lessee, without notice given to the lessor, as it is adjudged in Pennant's case in the Third Part of my Reports, 64 a. b. and the judgment Hil. 1 Jac. in trespass between Beconshaw plaintiff, and Southcote and others defendants, in this Court, that if the estate of the lord of the manor ceases by limitation of an use, and the use and estate thereof are transferred to another, who demands the rent of a copyholder, who denies

(c) "Where a party is really ignorant of the existence of the instrument in which the condition is contained, and where he would have good title, if there were no such instrument, it seems unreasonable to hold that a neglect of the terms of the condition should subject him to a loss of the estate; it would encourage the concealing of the instrument, till a breach were incurred, so to decide: and no substantial inconvenience can result from holding that the person entitled to avail himself of a breach should take care that the condition was known to the person

"who was to comply with it." Per Lord Ellenborough, *Doe v. Lord W. Beauchamp*, 11 East. 667., which case fully recognized the authority of *Fraunces's case*, and of *Malleon v. Fitzgerald*, 3 Mod. 28. S. C. Skin. 125, 179; and the case of *Rundall v. Ealey*, Cart. 92, 170., was over-ruled. In *Porter v. Fry*, 1 Vent. 199. S. C. [1 Freem. 31, 199. 1 Mod. 300. T. Raym. 236.] notice was held to be unnecessary, inasmuch as the party affected by the condition was not the heir, but claimed through the instrument containing the condition. Vid. *Prest. Shep. Touch.* 148.

to pay it him, it is no forfeiture, without notice given to the copyholder of the alteration of the use and estate: and *another judgment in this Court, that the bargainee of a manor by deed indented and inrolled, shall not take advantage of a forfeiture of (a) a copyholder for denial of payment of rent to him, without notice given to him of the bargain and sale, were all affirmed for good law by the whole Court (v). And this agrees with the reason of Barrough's case, Mich. 18 & 19 El. Dy. (b) 354 a. where uses were limited by fine under this proviso, "That if B. at any time during his life, &c. do pay, or cause "to be paid to the said A. 20l. at the font-stone within the "cathedral church of Sarum, that then, &c. the conusees in "the said fine, and their heirs, should stand seised to the use "of B. and his heirs." And it was resolved by Wray, Dyer, and Manwood, that tender of the 20l. at the place, according to the proviso, in the absence of A. and no notice of the time of the tender before given by B. to A., is not good in law to make the first uses cease, for the uncertainty of time during the life of B.; and therefore in such case notice of the time of the tender ought to be given, although he to whom the payment should be made was party to the conveyance: but in such case, when B. will make a tender, he ought to give notice to A. that he will at such time make the tender to him, and require him to be there to receive it; and then if he at the time appointed makes a tender, although A. absents himself, it is a good performance of the proviso to make the uses cease. But if a man binds himself in a bond to perform the award of J. S., and J. S. makes an award, the obligor ought to take (c) notice thereof at his peril, for he has bound himself thereto: and in such case no notice is requisite to be given to him, as it is held in (d) 1 H. 7. f. 5 a. b. A man was bound in a bond, on condition that if he should account before an auditor by the obligee to be assigned, when he should be by him required, of certain receipts of the manor of D., and should pay him the arrearages that should be found on his account before the said auditor; that then the obligation should be void: in debt on that bond, the defendant pleaded, that the plaintiff did assign him such an auditor, before whom he accounted, and that he has been always ready to pay the arrearages found before the auditor, if the said auditor had given him notice: and it was held by the whole Court, in (e) 18 E. 4. 18 a. and 24 a. that the plea was insufficient, for inasmuch as he has bound himself thereto, he has taken upon him to take notice at his peril; and there Brian, Vavasor, and Catesby, Justices, agreed, that in the said case of arbitrament, the obligor ought to take notice at his peril, and so they said it was adjudged in the same King's time in the King's Bench; and so is

[* 92 b.]

A refusal by a copyholder to pay rent to the bargainee of a manor before any notice given to him, is no cause of forfeiture.

Barrough's case cited.

(a) Co. Lit. 59a. Vin. Ab. Copy. Q c.

(b) 3 Bulstr. 326. 1 Mod. Rep. 88. Cart. 93. Palm. 434. Dyer 354. pl. 32. Cr. El. 299. 13 Co. 2. 2 Keb. 816. 2 Bulstr. 143. 1 Roll. 449. 3 Keb. 19. Cr. El. 298. Co. Lit. 211 a.

If a man binds himself in a bond to perform the award of J. S., and J. S. makes an award, the obligor must take notice at his peril.

(c) 4 Co. 82 b. Cr. El. 97. Owen 7. Cr. Jac. 391. (d) Br. Condit. 124. 4 Co. 82 b. March. Arbitr. 191. 1 Saund. 117. 2 Saund. 62. Vin. Ab. Notice A 2. Com. Dig. Plead. C 75. (e) Br. Det. 169. Br. Notice 13. Cr. Jac. 391. Mar. Arb. 191.

(b) In the stat. 4 Ann. c. 16. which renders allotment unnecessary, there is a proviso that no tenant shall be prejudiced or damaged by payment of rent to any grantor

or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of the grant by the conusee or grantee.

(a) Fitz. Arbit.
15. Br. Arb. 37.
Mar. Arb. 190.
4 Co. 82 b.

[*93 a.]

(b) Cr. Jac. 146.
Cr. Car. 577.
Winch. 118.
1 Mod. Rep. 87.

4. Although the title by which the plaintiff claims in his bar to the avowry is destroyed, yet he shall have judgment by reason of the title, which the defendant has given him.

(c) Wing. Max.
238. 7 Co. 25 a.
Posten 120 b.
3 Co. 52 b.
11 Co. 85 b.
Hob. 14.

(d) Winch. 75.

the law without question, against a sudden opinion in (a) 8 E. 4. 1 a (E). So *nota*, a good difference, when a man binds himself to do or perform any thing to be awarded, &c. by a *stranger, he thereby takes upon himself to take notice at his peril of all things incident thereunto for the saving of his own bond: but, as appears in the principal case, and in the other case before said, the law will not compel one to take (b) notice of acts done between strangers, or of any uncertainty on pain of forfeiture of his estate, or interest; but in such case notice ought to be given to them who are to have the loss. 4. It was resolved, that although now it (c) appears, that the title by which the plaintiff claims in his bar to the avowry was utterly destroyed, (for the plaintiff claims by the will of Richard Fraunces the father, which will as appears was afterwards countermanded by the said feoffment, which the avowant after pleads, and which the plaintiff confesses by his demurrer,) yet the plaintiff shall have judgment because his count is good. And the avowant in the replication to the bar of his avowry has done two things; one, he has destroyed the title which the plaintiff made by the will; the other, he has given the plaintiff another title, *scil.* to have the land for sixty years, &c. by force of the uses declared on the feoffment. So that upon the (d) whole record it appears (upon which the Court ought to judge) that the plaintiff has a lawful term in the land; and that the defendant has taken his cattle wrongfully, and therefore judgment ought to be given against the avowant, and for the plaintiff, although the title which he made for himself was destroyed (e). And judgment was entered accordingly.

(e) Acc. *Juxon v. Thornhill*, Cro. Car. 132. Brooke's Ab. Cond. 124. Notice 18. *Child v. Horden*, 2 Bulst. 144. *Crane v. Crampton*, Hutt. 80.; and *vid. n. 4. Hodsdon v. Harridge*, 2 Saund. 62.

(f) However defective the pleadings, and however imperfect the prayer of judgment on either side may be, the Court is bound *ex officio* to give such judgment, as upon the whole record the law requires. *Le Bret v. Papillon*, 4 East. 502. *Charnley v. Winstanley*, 5 East. 266.; but where a plaintiff seeks to recover damages for one ground of action stated in his count, he is not entitled to recover in respect of another disclosed by the defendant's plea; a plaintiff can recover only in respect of the ground of action stated in his declaration, *Marsh v.*

Bulleet, 5 B. and A. 511. S. C. 1 Dow. and Ryl. 106. S. C. 2 Chit. 317. There is a distinction between a plea in bar, and a plea in abatement: in the former the party may have a right judgment upon a wrong prayer, but not in the latter; for in abatement the Court will give no other than the proper judgment prayed for by the party, *Rex v. Shakespear*, 10 East. 83. *Attwood v. Davis*, 1 Barn. and Ald. 172. *Rex v. Taylor*, 3 Barn. and Cress. 502. S. C. 5 Dow. and Ryl. p. 422. and per Yates, J. *Rex v. Leigh*, 1 Burr. 2146. "In civil actions the plaintiff must recover upon his own title, in case of information in nature of *Quo warranto* for usurpation, upon the right of the Crown, the defendant must shew that he has a good title against the Crown."

EDWARD FOX'S CASE,

[93 b.]

Hil. 7 Jac. 1.

F. demised certain lands, &c. for life, reserving rent; afterwards, in consideration of fifty pounds, he by indenture demised, granted, set, and to farm let, the said lands, &c. to P., to have and to hold from the day of the date of the indenture, for ninety-nine years, paying a rent. Held, this demise and grant to P. amounts to a bargain and sale, so that the reversion with the rent passes to P. by the statute of Uses without any attornment. S. C. 2 Brownl. 291.

SMALMAN
v.
POWYS.
Pt. VIII.—93 b.

In a writ of second deliverance by Eliz. Smalman widow, and Thomas Powys defendant, which began in *Communi Banco*, 7 Jac. Rot. 1546, the defendant demurred on the bar to the avowry; and on the record the case was such: Edward Fox seised of four acres of meadow, fifty acres of pasture, and ten acres of underwood, in Snitton in the county of Salop, anno 31 Eliz. demised them to Gilb. Smalman, and to the said Elizabeth his then wife, and to Thomas Smalman, *habendum* to Gilbert and Elizabeth for their lives the remainder to the said Thomas for his life, yielding during their lives the yearly rent of four marks, at the feasts of the Annunciation of our Lady, and St. Michael the Archangel, by equal portions; and afterwards the said Gilbert Smalman died; after whose death, *scilicet* 20 Sept. anno 3 Regis Jacobi, the said Edward Fox by indenture, for the consideration of 50*l.* *præd'* by the said Thomas Powys to the said Edward Fox paid, † demised, † granted, set, and to farm let to the said Thomas Powys the said tenements aforesaid; to have and to hold to the said Thomas Powys from the day of the date of the said indenture, for the term of ninety-nine years, yielding and paying therefore during the said term, to the said Edward Fox and his heirs, the yearly rent of 40*s.* at the feasts of the Annunciation of our Lady, and St. Michael the Archangel, or within twenty-eight days after every of the said feasts, and that the said Eliz. did never attorn. And the only point in this case was, whether the said demise and grant to T. Powys should amount to a bargain and sale, so that the reversion with the rent should pass to T. Powys by the statute of uses without any (a) attornment (A). And it was adjudged that *this demise and grant upon consideration of 50*l.* amounts to a (b) bargain and sale for the said years; for in case when a freehold or inheritance shall pass by deed indented

Hard. 49.
Lit. Rep. 279.
Skinner 316.
Touch. 222.

†1 Mod. Rep.
87.
†1 Roll. Rep.
73.

(a) Cr. El. 166.
[* 94 a.]
(b) 1 Mod. 263.
177. 2 Mod. 251.
1 Ventr. 138.
2 Siderf. 26.

2 Ventr. 318. 1 Roll. Rep. 73. 2 Lev. 9. 2 Brownl. 291, 292. 2 Inst. 272. 1 Jones 206.

(A) The necessity of attornment is now taken away by stat. 4 Ann. c. 16. s. 9.

- and inrolled, it need not have the precise words of bargain and sale, but words (a) equipollent, or which do tantamount, are sufficient; as if a man (b) covenants in consideration of money to stand seised to the use of his son in fee; if the deed be enrolled, it is a good bargain and sale, and yet there are not any words of bargain and sale, but they amount to so much, as it is held in Bedel's case, in the Seventh Part of my Reports, 40 b. So if a man for money (c) aliens and grants land to one and his heirs, or in tail, or for life, by deed indented and enrolled, it amounts to a bargain and sale, and the land shall pass without any livery and seisin. And at the common law before the statute of (d) 27 H. 8. of Uses, if a man for money had aliened and granted lands to one and his heirs, &c. by that the use of the land should pass, for it is a full bargain, and all this was unanimously agreed; but forasmuch as the (e) intention of the parties is the creation of uses, (f) if by any clause in the deed it appears, that the intent of the parties was to pass it in possession by the common law, there no use shall be raised; and therefore if any letter of (g) attorney be in the deed or covenant to make livery of the lands, according to the form and effect of the deed, or other such like, there it shall not pass by way of use; *quia, verba intentioni non e contra debent inservire; et verba debent intelligi, ut aliquid operentur* (b). But in the case at bar, the intent of the grantor may be well collected, that he did intend that the grant should take effect presently, and should not depend upon any subsequent attornment; for the rent reserved thereupon was payable presently; and therefore it will be reasonable, that Tho. Powys the lessee should have the rent reserved on the first lease for lives presently; and that he cannot have before attornment (which peradventure will never be made) and *eo potius* because the said Thomas Powys has no means to compel the first lessees to attorn; but if it shall pass as a bargain and sale, it shall be presently executed by the statute of 27 H. 8. for there needs no (h) inrolment in this case, because but a term for years passes, and no estate of freehold, and there needs no (i) attornment, because it is executed by the statute. And by this construction every one will have remedy for that which he ought to have. *Vide* Sir Rowland (k) Heyward's case, in the Second Part of my Reports, fol. 35 b.
- (a) 2 Inst. 672.
2 Ventr. 318.
(b) 2 Brownl. 291, 292.
2 Inst. 672.
1 Ventr. 138.
2 Ventr. 318.
7 Co. 39 b.
11 Co. 24 b. 25 a. Cro. El. 394.
Cart. 138, 146.
Palm. 214, 215.
Jenk. Cent. 289.
(c) 2 Inst. 272.
(d) 27 H. 8.
c. 10.
(e) Co. Lit. 49a.
2 Inst. 272.
Hardr. 49.
1 Co. 100 a.
(f) 2 Inst. 272.
(g) 2 Brownl. 291, 2 Inst. 272.
2 Roll. 787.
Co. Lit. 49 a.
(h) 2 Co. 36 a.
2 Roll. Rep. 204.
2 Inst. 671.
2 Brownl. 292.
(i) 2 Co. 36 a.
6 Co. 68 b. 69 a.
2 Brownl. 291, 292.
(k) 1 Brownl. 142. 2 Brownl. 292. 1 Jones 206. 2 Roll. 787. Hob. 159. Poph. 95. 2 Anders. 202, 203. 2 Inst. 671, 672. Yelv. 123, 124. 1 Mod. Rep. 176.

(b) In Anon. 3 Leon. 16., it was determined to the contrary. In that case, A. by deed indented, conveyed in the following words,—“I the said A. have given, granted, and confirmed, for a certain piece of money, &c.” the *habendum* was to the feoffee with warranty against A. and his heirs; and there was a letter of attorney to make livery and seisin. The deed was enrolled within one month after the making

of it; and the attorney after four months from the delivery made livery of seisin. It was the opinion of the whole Court, that the conveyance should operate as a bargain and sale. Vid. 4 Cruise Dig. 107. 3d edit. Sanders on Uses, Vol. II. p. 48.

Vid. as to electing in what way an estate shall pass, notes (b), (c), *Heyward's case*, Vol. I. p. 526.

MATTHEW MANNING'S CASE,

[94 b.]

Trin. 7 Jac. 1.

One being possessed of a farm, &c. for the term of fifty years, devised his lease of the farm, &c. and all the years therein to come to B. after the death of M. the testator's wife, &c.; and in the mean time his will and meaning was, that his wife should have the use and occupation of the farm, &c. during her natural life, &c. Resolved,—1. B. shall have the term by way of executory devise, and not by way of remainder. 2. The devise being of a chattel, may vest and revest at the pleasure of the devisor. 3. There is no difference between a devise of land, or a lease, or farm for life, remainder over, and a devise of the use or occupation, or profits of the land in the same manner. 4. After the executor has assented to the first devise, the first devisee cannot bar the executory devise. 5. A man may create an interest by his will, which he cannot create during his life by grant or conveyance at common law.

CLARK
v.
MANNING.
Pt. VIII.—94 b.

A devise to executors for payment of debts, and until they are paid, remainder over, gives the executors but a chattel interest. But if such estate be given by grant or conveyance at common law, the law will adjudge it an estate of freehold.

*One possessed of a lease for 99 years, devised it to his wife for life, and after her death to her children unpreferred, and made his wife executrix, and died, the wife entered, and was possessed as legatee. The wife married, a judgment was obtained against the husband, and a *feri facias* directed to the sheriff of London, who sold the term. The judgment was reversed by writ of error; the wife died; upon ejectment brought by the executory devisee against the vendee; held, The sale by the sheriff on the *feri facias* shall not destroy the executory devise, although the person to whom the executory devise was made was then uncertain. Also the sale by force of the *feri facias* shall stand, and the plaintiff in the writ of error shall be restored to the value.* Vid. the entry, Co. Ent. 149. nu. 29.

IN debt for 200 marks by William Clark plaintiff, and Matthew Manning administrator of Edward Manning deceased, upon *plene administravit* pleaded, the jury gave a special verdict to the effect following, which plea began Mich. 4 Jacobi, Rot. 1829. Edward Manning the intestate, anno 30 Eliz. was possessed of the moiety of a mill in Clifton in the county of Oxford, for the term of fifty years, of the clear yearly value of 40*l*. and afterwards the said Edward Manning, 30 Eliz. made his

Skinner 545.
Swinb. 134,
135.

will in writing, and thereby devised his indenture and lease of the farm and mill in Clifton, and all the years therein to come to Matthew Manning after the death of Mary Manning my wife, (which farm and mill my will is, that Mary Manning my wife shall enjoy during her life) conditionally, that the said Matthew shall not demise, sell, or give the said lease, but to leave it wholly to John his son, &c. "In the mean time my will and meaning is, that Mary Manning my wife shall have the use and occupation both of the farm and mill, &c. during her natural life: yielding and paying therefore yearly to the said Matthew Manning, &c. during her natural life 7l. at the feasts of St. Michael the Archangel, and the Annunciation of our Lady," and made Mary his wife sole executrix, and died; Mary took upon her the charge of the will, and had not sufficient to pay the debts of the said Edward Manning above the said term; but she entered into the said farm and mill, and paid to Matthew Manning the yearly sum of 7l. according to the said will; and (a) said, that if she died, the said Matthew Manning should have the farm and mill aforesaid; and afterwards the said Mary, sixteen years after the death of her husband, died intestate, after whose death the said Matthew Manning entered into the said farm and mill, and was thereof possessed *prout lex postulat*; and afterwards administration of the goods of the said Edward by the said Mary not administered was committed to the said Matthew, and that none of the profits of the said farm and mill, which accrued in the life of the said Mary came to the hands of the said Matthew besides the said 7l. yearly as aforesaid. And the doubt of the jury was, if the residue of the said term in the said farm and mill should be assets in the hands of the said Matthew. But I conceived on the trial of the issue at Guildhall in London, that the devise to Matthew was good, and that there was sufficient assent to the legacy, by the said payment of the rent of 7l. But yet upon the motion of the plaintiff's counsel, I was contented that the whole special matter should be found as is aforesaid. And the case was argued at the bar, and at divers several days debated at the Bench, and *primâ facie* Walmsley, Justice, conceived, that the devise to Matthew Manning after the death of the wife was void, for the wife having it devised to her during her life, she had the whole term, and the deviser could not devise the (b) possibility over, no more than a man can do by grant in his life; for that which the testator cannot by no advice of counsel in his life, (c) the testator, who is intended to be *inops consilii*, shall not do by his will; but by grant in his life he could not grant the land unto the wife for her life, the remainder over to another, for by the grant the wife had the whole term at least if she so long lived, and a possibility cannot be limited by way of remainder; and although the later opinions in the case (where a man possessed of a lease for years devises it to one for life, the remainder to another,) have been that the remainder was good; yet he said that the old opinion, which hath more reason, as he conceived, was, that

(a) 2 Brownl.
173. Cr. Jac.
459.

[* 95 a.]

Post. 10 Rep.
52 b. and notes.

(b) Cro El. 9,
217. Cro. Jac.
198.

(c) 1 Co. 85 b.

the remainder in such case was void, 28 H. 7. (a) 7 Dyer, Baldwin and Shelley, that the remainder is void, Englefield contrary. (b) 6 E. 6. 74. acc. by Hales and Montague, 2 E. 6. tit. Devise, Brook 13. that the remainder is void, for the devise of a chattel for one hour is good for ever. But Coke, Chief Justice, Warburton, Daniel, and Foster contrary, that the devise was good to Matthew Manning; and five points were by them resolved. 1. That Matthew Manning took it not by way of remainder, but by way of an (c) executory devise, and one may (d) devise an estate by his last will in such manner, as he cannot do by any grant or conveyance in his life, as if a man is seised of lands in fee held in socage, and devises that if A. pays such a sum to his executors, that he shall have the land to him and his heirs, or in tail, or for life, &c. and dies, and afterwards A. pays the money, he shall have the land by this executory devise, and yet he could not have it by any grant or conveyance executory at the common law; but it stands well with the nature of a devise; so in the case *at bar when the wife dies it shall vest in Matthew Manning as by an executory devise, as if he had devised that after a son has paid such a sum to his executors, that he shall have his term; or that after the death of A. that B. shall have the term; or, that after his son shall return from beyond the seas, or that A. dies, that he shall have it, in all these cases and other like, upon the condition or contingent performed, the devise is good, and in the mean time the testator may dispose of it; and therefore in judgment of law, (e) *ut res magis valeat*, the executory devise shall precede, and the disposition of the lease, till the contingent happen, shall be subsequent, as in the case at bar it was, and so all shall well stand together; for when he made the executory devise, he had a lawful power, and might well make it: and afterwards in the same will he had lawful power, and might well devise the lease till the contingent happened, and therefore it is as much (f) as if the testator had devised, that if his wife died within the term, that then Matthew Manning should have the residue of the term; and farther devised it to his wife for her life (A). 2. The case is more strong, be-

chattel may vest and revert at the pleasure of the devisor. (c) 1 Co. 76 a. 69. 5 Co. 55 b. 1 Mod. Rep. 109. (f) Swinb. 135.

(a) Dy 7. pl. 8, 9. 1 Bulst. 191, 192. Mo. 758. Post. 97 a. Wentw. 334. Palm. 334. (b) Dy. 74. pl. 18. 1 Bulstr. 195.

1. M. M. shall have the term by way of executory devise, and not by way of remainder.

(c) 2 Bulst. 28. 1 Jones 15. 1 Lev. 290.

1 Mod. Rep. 52, 115. Mo. 635, 748, 758. 4 Co. 66 b. 2 Roll.

[* 95 b.]

Rep. 218, 220, 427. Cr. El. 796. Cr. Jac. 198, 460, 461.

Cr. Car. 230. B. N. C. 209.

10 Co. 47 a. b. Swinb. 134, 135.

2 Brown. 173. 33 H. 8. Br.

Chat. 23. 1 Bulstr. 191, 192, &c. 1 And.

122. c. 170. (d) Swinb. 135.

2 Brown. 309. See Cro. Car.

166. Sanders v. Cornish. Dyer 74.

2. The devise being of a

3 Keb. 288. 2 Jo.

(A) In this case as well as in *Lampet's case*, 10 Rep. 46 b. the devise over was to a person *in esse* and ascertained; the same doctrine holds also in cases where the ulterior devisee is not *in esse*; *Cotton v. Heath*, 1 Roll. Ab. 612. pl. 3. 1 Eq. Abr. 612. pl. 3. or not ascertained. *Amner v. Loddington*, post, p. 334. S. C. 1 And. 60. affirmed on error, 3 Leon. 89. And in equity the same doctrine extends to chattels personal. *Vachel v. Vachel*, 1 Chan. Cas. 129. 2 Freem. 137. cas. 172. *Catchmay v. Nicholls*, 1 P. Wms. 6. *Shirley v. Ferrers*, 1 P. Wms. 6. 2 Freem. 206. cas. 280. *Hyde v. Parrat*, 1 P. Wms. 1.

Freem. 145. cas. 186. *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 277. *Fearnor Cont. Rem.* 404. Vide Mr. Hargrave's argument in *Thelluson v. Woodford*, 4 Ves. 255. *Howard v. The Duke of Norfolk*, 2 Swanst. 464 for an account of the rise and progress of Executory Devises. "But when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over after a life interest must be held to be ineffectual." *Per Sir Wm. Grant, M. R. Randall v. Russell*, 3 Meriv. 195.

- (a) Swinb. 135. cause this devise is but of a chattel, whereof no *Præcipe* lies; and which may (a) vest and revest at the pleasure of the devisor, without any prejudice to any. And therefore if a man makes a lease for years, on condition, that if he do not such a thing, the lease shall be void, and afterwards he grants the reversion over, the condition is broken, the grantee shall take (b) benefit of this condition by the common law, for the lease is thereby absolutely void: but in such case if the lease had been for (c) life, with such condition, the grantee should not take the benefit of the breach of the condition; for a freehold (of which a *Præcipe* lies) cannot so easily cease; but is voidable by entry after the condition broken, which cannot by the common law be transferred to a stranger (b); and therewith agrees (d) 11 H. 7. 17 a. and Br. Conditions 245. 2 *Mariae*, by Bromley the same difference. 3. There is no difference when one devises his term for life, the remainder over; and when a man devises the land, or his lease, or farm, or the use (c), or occupation, or profits of his land (c); for in a will the intent and meaning of the devisor is to be observed, and the law will make construction of the words to satisfy his intent, and to put them into such order and course that his will shall take effect. And always the (f) intention of the devisor expressed in his will is the best expositor, director, and disposer, of his words; and when a man devises his lease to one for life, it is as much as to say, he shall have so many of the years as he shall live, and that if he dies within the term that another shall have it for the residue of the years; and although at the beginning it be uncertain how many years he shall live, yet when he dies it *is certain how many years he has lived, and how many years the other shall have it, and so by a subsequent act all is made certain. 4. That after the executor has assented to the first devise, it lies not in the power of the first devisee to (g) bar him who has the future devise, for he cannot transfer more to another than he has himself (d).
- (b) 3 Co. 64 b. 65 a. 10 Co. 48 b. Co. Lit. 214 b. 219 a. Plowd. 135 b. 136 a. Cr. El. 649, 650. 1 Roll. 473, 474. 1 Leon. 61.
3. There is no difference between a devise of land, or of a lease or farm for life, remainder over; and a devise of the use or occupation or profits of the land in the same manner. (c) 10 Co. 48 b. Co. Lit. 214. Plowd. 135 b.
- (d) 3 Co. 65 a. [*96 a.]
4. After the executor has assented to the first devise, the first devisee cannot bar the executory devise. (e) 1 Bulst. 192. 2 Bulstr. 23. March. 106. Post. 96 b. Godb. 26. Swinb. 135. Jenk. Cent. 264. 10 Co. 47 a. b. Plowd. 524, 541 b. Cro. El. 190. Co. Lit. 4 b. (f) Plowd. 522 b. 523 a. Bridgm. 135. Co. Lit. 112. Cro. Car. 9. (g) Dy. 74. pl. 18, 140. pl. 41. Cro. Jac. 460, 461. Moor 748. 2 Brown. 173. Cro. Car. 293. 1 Bulstr. 194. 3 Bulstr. 123. 1 Roll. 620.

(b) Vid. note (π). *Sir Moyle Finch's case*, Vol. III. p. 396.; note (π), *Pennant's case*, Vol. II. p. 174.

(c) Vid. *Lampet's case*, 10 Rep. 4. *Mallet v. Sackford*, Cro. Jac. 193. *Wright v. Cartwright*, 1 Burr. 284. Roll. Ab. Devise K. So in the case of goods no difference is now admitted between a devise of them for life and a devise of the use of them for life, *Freem. Cases in Ch.* p. 206. cas. 280. *Hyde v. Parrot*, 1 P. Wms. 1. *Fearne Cont. Rem.* 406.

(d) Acc. *Lampet's case*, 10 Rep. 47. b. And a forfeiture incurred by the first devisee of the term, by making a feoffment of the lands will not destroy the executory devise over. *Cotton v. Heath*, Pollexf. 26.

"It seems to follow, as a consequence of this exemption of executory interests, from the power of the first devisee or legatee, that where there is an interest devised to one for life, &c. out of a term, and then an executory devise over of the residue of the term to another, any subsequent union of the freehold or inheritance, with the interest so given to the first devisee, will not extinguish or affect the interest of the ulterior devisee; for if it could, the executory interest might easily be annihilated, without any prejudice to the temporary interest of the first devisee, by collusion betwixt him and the reversioner." *Fearne Cont. Rem.* 421. Vid. *Ham-*

5. In many cases a man by his will may create an interest, which by grant or conveyance at the common law he cannot create in his life; and therefore when Sir William (a) Cordell, Master of the Rolls, devised his manor of Melford, &c. in the county of Suffolk, to his executors for the payment of his debts, and until his debts should be paid, the remainder to Edward his brother, &c. and made George Carey and others his executors, and died, and after his death the debts were paid; and his wife demanded dower, and one question amongst others was moved, what interest or estate the executors had? for if they had a freehold, then the wife should not have dower, and if they had but a chattel determinable upon the payment of the debts, then she should be endowed; and this case was referred to Anderson, Chief Justice of the Common Pleas, and Francis Gawdie, Justice of the King's Bench, before whom the case was at several days debated, *Pasch. 36 Eliz.* and I was of counsel with the executors; and it was resolved by them, that the executors had but a chattel, and no freehold;

5. A man may create an interest by his will, which he cannot create during his life by grant or conveyance at common law. A devise to executors for payment of debts, and until they are paid, remainder over gives the executor but a chattel interest.

(a) Co. Lit. 42 a. Cr. El. 315, 316.
1 Jones 25.
1 Roll. 829, 830.

Raym. 136, 137. 1 Sid. 224. 2 Bulst. 273. Aleya 47. 1 Lev. 170.

mington v. Rudyard, cited in *Lampet's case*, 10 Rep. 50 a. and note *ib.*

The same doctrine that executory interests cannot be barred by the act of the first devisee extends to executory dispositions of personal chattels. *Cadogan v. Kennet*, Cowp. 432. *Foley v. Burnell*, 4 Brown. Parl. Cas. 319. *Hoare v. Parker*, 2 T. R. 376. *Hartop v. Hoare*, 3 Atk. 44. *Earl Macclesfield v. Davis*, 3 Ves. and Beam. 16. *Fearne Cont. Rem.* 421.

To prevent perpetuities the contingency upon which an executory interest of this nature is permitted to take effect must happen within the compass of a life or lives in being and twenty-one years after, allowing a short time for the birth of a child *en ventre sa mere*. *Thelluson v. Woodford*, 4 Ves. 327. *Long v. Blackall*, 7 T. R. 100. *Goodtitle v. Wood*, *ib.* 103. n. S. C. Willes, 213. *Porter v. Bradley*, 3 T. R. 146. It is an established rule, that the limitation of a term after a general failure of issue is void, as being too remote. *Saltern v. Saltern*, 2 Atk. 376. *Beauclerk v. Dormer*, 2 Atk. 312. If however the testator makes use of words in his will which indicate an intention to confine the generality of the expression of dying without issue to dying without issue living at the time of the person's decease, they will be so construed to effectuate the intent. As where a testator devised to his son A. for life, and no longer, and after his decease to such of A.'s issue as A. should by will appoint; and in case A. should die, without issue, then he devised the lands over; these words upon the whole of the will were construed to mean issue living at his death, because it was to be intended such

issue as A. should or might appoint the term to, *viz.* issue then living. *Target v. Gaunt*, 1 P. Wms. 432. and *vid.* *Fearne Cont. Rem.* 471. and the cases collected there. "Where leasehold estate is given to a person and the heirs of his body, with a limitation over if he dies, and the testator uses the words 'and leaves no such heirs,' the settled construction is that it means at his death." *Per* Lord Chancellor Eldon, *Crooke v. De Vandes*, 9 Ves. 204. But a different construction prevails in the case of real estates. *Ib.* *Daunsey v. Griffiths*, 4 M. and S. 61. *Glover v. Monkton*, 3 Bing. 13. and the cases cited there.

From the certificate of the Judges of C. B. in *Beard v. Westcott*, 5 Taunt. 393. it would seem that they were of opinion that an executory devise may be limited to take effect twenty-one years after a life in being, without reference to the birth and infancy of the devisee who is then to take. But the Judges of the Court of King's Bench to whom another case was directed to be sent, seem to have been of a contrary opinion. *Beard v. Westcott*, 5 Barn. and Ald. 801. and their decision was approved of by the Lord Chancellor Eldon, 1 Turn. 25. From the same case, it would also seem that where a preceding particular estate is void on account of a perpetuity, the remainders dependent upon it are also void.

Such limitations as in *Manning's case*, sup. may be created not only by will, but also by deed. *Wright v. Cartwright*, 1 Burr. 285.; and such limitations are governed by the same rules as executory devises of a term. *Fearne Cont. Rem.* 470.

But if such estate had been by grant or conveyance at common law, the law will adjudge it an estate of freehold.

for if they should have a freehold for their lives, then their estate would determine by their death, and not go to the executors of the executors, and so the debts would remain unpaid; but the law adjudges it a particular interest in the land, which shall go to the executors of the executors, as assets for payment of his debts. But if such estate be made by grant, or conveyance at the common law, the law will adjudge it an estate of freehold, and so a more favourable interpretation is made of a will in point of interest or estate to satisfy the will of the dead for the payment of his debts, than of a grant or conveyance in his life; which he may enlarge, or make other provision at his pleasure. And so was it resolved in the beginning of the reign of Queen Elizabeth, that where a man had issue a daughter, and devised his lands to his executors for the payment of his debts, and until his debts were paid, and made his executors and died, the executors entered, the daughter married, and had issue and died, and after the debts were paid, it was resolved in the case of one Guavarra, that he should be tenant by the curtesy (e). *Vide* 3 H. 7. 13. 27 H. 8. 5. 21 Ass. p. 8. 14 H. 8. 13.

(a) 2 Brown. 309. Plow. 516, 519. 2 Leon. 92. 3 Leon. 89.

Amner v. Loddington, in C. B. One possessed of a lease for ninety-nine years devised it to his wife for life, and after her death to her children unpreferred, and made his wife executrix, and died. The wife entered and was possessed as legatee. The wife married, a judgment was obtained against the husband, and a *feri facias* directed to the sheriff of London, who sold the term. The judgment was reversed by writ of error, and the wife died. Upon ejectment brought by the executory devisee against the venter, held,—1. The executory devise after the death of the wife is good. 2. The sale by the sheriff does not destroy the executory devise. 3. The sale by the sheriff by force of the *feri facias* shall stand, and the plaintiff in the writ of error shall be restored to the value.

[* 96 b.]

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(b) 2 Brown. 309. Plow. 539, 540. 2 Leon. 92. 3 Leon. 89. (c) 2 Leon. 92. 3 Leon. 89. Godb. 26. 1 And. 60. 1 Roll. 612. (d) Jenk. Cent. 264. Moor 758. 1 Bulst. 192. 1 Roll. 612. 2 Leon. 92. 1 Leon. 82. Co Litt. 351 a. Godb. 26.

(e) Acc. Rolle's Ab. Estates D. Price v. Vaughan, Aleyn 47. Co. Litt. 42 a. "But

"feoffment to the use of A. for life, remainder to the use of B. his executors and assigns, till ten pounds shall be levied out of the profits, ruled to be a chattel." Hal. MSS. Harg. Co. Litt. 42 a. "The difference is between a limitation of use to a man till 12,000*l.* raised: that

Note reader, it has been of late often adjudged according to these resolutions, *sc.* in Weldon's (a) case, Plowden's Commentaries, in *Communi Banco*. In Paramour's (b) case, Plowden's Commentaries in the King's Bench, Mich. 26 and 27 Eliz. in a writ of (c) error in the King's Bench, on a judgment given in the Common Pleas, the case was such, Thomas* (d) Amner brought an *ejectione firmæ* against Nicholas Loddington on a demise made by Alice Fuleshurst for seven years of certain houses in London, and on not guilty pleaded, the jury gave a special verdict. Hugh Weldon was seised of the said houses in fee, and 24 H. 8. demised them to Thomas Pierpoint for ninety-nine years, who by his will in writing 1544, devised his said lease in these words: "I devise my lease to my wife during her life, and after her death I will it go to her children unpreferred," and made his wife his executrix, and died, his wife entered and was possessed *ratione*

perhaps, in a use (for it is not so clear as in a devise) may be a chattel. But if it be limited to the use of a man and his heirs, till 12,000*l.* raised, it is a limited fee simple." Per Sir O. Bridgman, C. J. *Bosworth v. Forard*, O. Bridgman, 167. and vid. ib. 507. *Thomason v. Mackworth*.

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doni et legationis, and married with Sir Thomas Fulleshurst, and afterwards 2 and 3 Phil. and Mar. Bestwick recovered against Sir Thomas 140*l.* debt in the Common Pleas, and by force of a *Fieri facias* directed to Altham and Mallory Sheriffs of London the said [†] term was sold to Nicholas Lodington the now defendant, and afterwards the judgment against the said Sir Thomas Fulleshurst was reversed in a writ of error in the King's Bench, *et quod ad omnia quæ amisatione judicis præd' restitatur*, and afterwards Alice the wife and executrix died. Alice Fulleshurst being then the only daughter who was unpreferred, entered and made the lease to the plaintiff Thomas Amner. And this case was often argued at bar by the Serjeants in the Common Pleas, and at last by the Judges; and in this case three points by them were resolved.

1. That the said (a) executory devise of the lease after the death of the wife to the daughter unpreferred, was good; and there is no difference when the term, or lease, or houses, (b) and when the use or occupation, &c. is devised, and that in all these cases the executory devise is good. 2. That the sale either by Alice the wife, or by the Sheriff on the *Fieri facias*, after the wife was possessed as legatee, should not (c) destroy the executory devise, although the person to whom the executory devise was made was then uncertain, as long as Alice the wife lived; for the said Alice the daughter might have been preferred in her life, and then she should take nothing, so that such executory devise which has dependence on the first devise may be made to a person uncertain, and this possibility cannot be defeated by any sale made by the first devisee, &c. 3. That the sale by the Sheriff by force of the *Fieri facias* (d) should stand, although the judgment was after reversed, and the plaintiff in the writ of error restored to the value, for the sheriff who made the sale, had lawful authority to sell, and by the sale the vendee had an absolute property in the term during the life of Alice the wife; and although the judgment, which was the warrant of the *Fieri facias*, be afterwards reversed, yet the sale which was a collateral act done by the Sheriff, by force of the *Fieri facias*, shall not be avoided; for the judgment was that the plaintiff should recover his debt, and the *Fieri facias* is to levy it of the defendant's goods and chattels, by force of which the Sheriff sold the term which the *defendant had in the right of his wife, as he (e) well might, and the vendee paid money to the value of it (f). And if the sale of the term should be avoided, the vendee would lose his term, and his money too, and thereupon great inconvenience would follow, that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done. And according to these resolutions judgment was given in the Common Pleas for the plaintiff, and in the King's Bench upon a

[†] Co. Lit. 351 a.

(a) 1 Roll. 612.
Godb. 28.
Jenk. Cent.
264. Cro. El.
796.

(b) Ante 95 b.
1 Bulst. 192.
2 Bulst. 28.
March 106.
Godb. 26.
Swinb. 135.
10 Co. 47 a. b.
Plowd. 524 a.
Cro. El. 190.
(c) 1 Roll. 937.
1 Bulst. 192.
2 Leon. 93.
1 And. 61, 62.

(d) Post. 143 a.
1 Roll. 778.
Mo. 573. Dy.
363. pl. 24. Cr.
El. 278. Cr. Jac.
246. 5 Co. 90
b. Jenk. Cent.
264. Yelv.
180. 2 Leon.
53. 3 Leon.
89, 90. Godb.
27, 28. Post.
143 a.

[* 97 a.]
(e) Co. Litt.
351 a.
Post. 171 a.

(f) Vid. note (c), *Hoe's case*, Vol. III. p. 183.

(a) Dy. 7. pl.
8, 9.
Antea 95 a.
1 Bulst. 191,
192. Moor 758.
Wentw. 334. Palm. 334.

writ of error the case was often argued at the bar before Sir Christopher Wray, and the Court there, and at length the judgment was affirmed, and so the said three points were adjudged by both Courts: and by these latter judgments you will better understand the law in the books, in which there are variety of opinions. 37 H. 6. 30. 33 H. 8. Br. tit. Chattels 33. 2 E. 6. tit. Devise. Br. 13. 28 H. 8. (a) Dyer 277. Plow. Com. in Weldon's and Paramor's case, &c. *Quia judicia posteriora sunt in lege fortiora.*

[97 b.]

BASPOLE'S CASE,

Hil. 7 Jacobi I.

FREEMAN
v.
BASPOLE.
Pt. VIII.—97 b.

An award, that one shall pay so much to the other in consideration of a debt long due, and for his costs thereby sustained, is mutual.

When the submission is of all controversies, and the award is made of the said premises in the said condition specified, and only one matter is adjudged upon, the award is good, and it shall be intended that the award was made of all that was referred to the arbitrator.

Although there are many things in controversy, yet if one only is notified to the abitrator, he may make his award of that.

If several things in perticular are referred, with a condition that the award be made of the premises, &c. the arbitrator must make his award of all, or the award will be void. Otherwise, where there is no such condition. S. C. [2 Brownl. 309. Cro. Jac. 285.] S. C. but not S. P. 1 Bulstr. 144.

WILLIAM FREEMAN brought an action of debt on a bond of 25*l.* bearing date 9 *Aprilis an. 6 Jac.* against John Baspole: the defendant demanded oyer of the condition, which was, "That if the within bounden John Baspole, &c. shall well and truly stand to, abide, fulfil, and keep the award, arbitrament, order, rule, judgment, and final determination of Francis Theobald, Gent. indifferently named, elected, and chosen, as well on the part and behalf of the said John Baspole, as of the said William Freeman, for to order, judge, rule, and final determination to make of all matters, suits, debts, duties, actions, and demands whatsoever had, made, or depending between the said John and William from the beginning of the world until the day of the date hereof, so as the said award, order, and final end be made and given up under the hand and seal of the said Francis Theobald, to

"either of the said parties, at or before the feast of St. James the Apostle, next ensuing, that then this present obligation to be void;" and pleaded, that the arbitrator *nullum fecit arbitrium, &c. de et super præmissis in conditione præd' specificat'*. The plaintiff replied, that the arbitrator 25 Junii, an. 6 Reg. nunc, by his writing, made an order and award between the said William and John, *de et super præmissis prædict' modo et forma sequentibus, viz.* that whereas a suit was depending between the said John Baspole and William Freeman, for a debt due by William Baspole, father of the said John Baspole deceased, to Robert Freeman, father of the said William Freeman deceased, which just debt was 20*l.* to be paid by seven years then past to the said Robert Freeman, and now due to William Freeman, as administrator of his father, which debt the said John Baspole, *pro bona considerat'* *promised to pay to the said William as upon good proof appeared to the arbitrator: that the said John Baspole should pay to the said William Freeman, in consideration of the said debt long due, and for his great costs in that part sustained, the sum of 22*l.* and that after he requested the said John Baspole to pay the said sum of 22*l.* which he refused, &c. upon which the defendant demurred in law. And two objections were made against this arbitrament:—1. Because the arbitrament was made of (a) the one part, and not of the other, as in 7 H. 6. 40 b. that one party should go quit of all actions had by the other against him; and nothing is spoken of the actions which he had against the other, and therefore void. 2. It doth not appear that this matter of which he makes the arbitrament, was the matter only which was between them, for the submission is general of all actions and demands (b) *so as the said award be, &c.* So that if he doth not make the award of all matters in controversy, the award is void. To which it was answered and resolved, that as to the first, the award was sufficient (c) and good; for here the award is as well of the one part as of the other, for the one receives money, and the other is discharged of the debt, and of his promise to pay it; and is not like the said case of 7 H. 6. for there one would be discharged of the actions, and the other would receive nothing in satisfaction thereof. *Vide (d)* 22 E. 4. 25 b (A). As to the second objection it was

[* 98 a.]

(a) 1 Roll. Rep. 1, 270. Cro. Jac. 200, 447, 664. Cr. El. 904. 7 H. 6. 40, 41 a. Fitz. Arbit. 2. Br. Arbit. 17. Poph. 134. 1 Leon. 72, 73. 1 Roll. 253. Dy. 356. pl. 39. (b) Cr. El. 838, 858. Cr. Jac. 200, 278, 578. Cr. Car. 216. March. Arbit. 177. Noy 62. 1 Brownl. 58, 112. 1 Roll. 256. 1 Roll. Rep. 437. 1 Bulst. 123. Aleyn 52. 1 Sid. 25.

Hutt. 9, 29. Yelv. 203. Hard. 45. 4 Leon. 94. (c) Dyer 356. pl. 39. 1 Roll. 253. 1 Brownl. 58. March. Arbitre. 210. Cro. Jac. 447. (d) 2 Roll. Rep. 1. 1 Bulst. 123.

(A) In *Veale v. Warner*, 1 Saund. 326. wherein debt on bond the award appeared on the pleadings to have been made of and upon the premises in the condition, and to have awarded that one party should pay to the other a sum of money, and also give him a general release; the Court was of opinion, that the award was bad for want of mutuality. This decision, which is at variance with the first resolution in *Baspole's case*, is successfully combated by Mr. Serjt. Williams, n. 2. ib. 328.

Nothing more is requisite to form the

mutuality of an award, than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favour the award is made against the other for the cause submitted. Therefore an award that one shall pay the other so much for a trespass is good. *Nichols v. Grunnion*, Hob. 49. *Horton v. Benson*, Freem. 204. *Aylard v. Nicholls*, ib. 265. *Ormlade v. Cooke*, Cro. Jac. 354. So also an award that the defendants should pay the plaintiffs 10*l.* for costs in a suit commenced against them by the defendants without cause,

- answered and resolved,—1. That it appears by the award that it was made (a), *de præmissis præd' in conditione præd' specificat'*, which words imply, that he had made an arbitrament of all that which was referred to him, and so shall it be intended until the contrary be shewed and alleged by the other party; for when the submission is general of all actions, &c. (b) *generale nihil certi implicat*, and therefore it may well stand with the generality of the words, that there was but one cause depending in controversy between them: but where the submission is of (c) certain things in special, and with a proviso or condition, that the award be made, *de præmiss'*, &c. or words which are tantamount, there the arbitrator ought to make the award of all, otherwise it is void. But if divers things in special are submitted (d) without such conditional conclusion, the arbitrator may make the award of any of them (e). And as it
- (a) 1 Sid. 252. Hutt. 9. 1 Roll. Rep. 437. Hob. 191. Cr. El. 839, 858. Cr. Jac. 200, 278, 578, 664. Cr. Car. 216. (b) 2 Co. 33 b. 2 Roll. Rep. 360. 3 Keb. 414. 2 Sid. 36. (c) Cr. El. 839, 858. Hob. 49. Hardr. 45. Dy. 242. pl. 52. March. Arbit. 183. Cr. Jac. 200, 355. 4 Leon. 94. (d) Cr. El. 832. Cr. Jac. 200, 355, 664. Dyer 242 b. Hob. 49.

and that all suits and differences should cease, *Walmough v. Holgate*, 2 Ventr. 221. *Squire v. Grevill*, 6 Mod. 35. So an award that the defendant should pay a sum of money, and take his mare, &c. from the plaintiffs, within a week, is good. *Cooper v. Hirst*, 1 Lutw. 539. So also an award to pay 7l., and the costs in a suit to the plaintiff, is good. *Thomlinson v. Ariskin*, Com. 328. So also an award that all suits and controversies shall cease, &c. is good. *Harris v. Niipe*, 1 Lev. 58. *Edwards v. Pierce*, Comb. 221. Vin. Ab. Arbit. K. pl. 29. So also an award reciting that several differences had been between the plaintiff and defendant concerning a house, and divers elms, and arrears of rent. They (the arbitrators) to make a final end of all, awarded, that the defendant should pay to the plaintiff 4l. for all the said arrears of rent, is good, and sufficiently mutual, because the words "for the arrears" signified "in satisfaction of the arrears," and although the award recited other matters, yet it shall be intended that such matters were otherwise determined, or at least the award saying to make an end of all differences should be taken to mean that the 4l. was in satisfaction of every thing; the others not appearing, but by the recital of the award itself. *Hopper v. Hacket*, 1 Lev. 132. So also an award, which after reciting that there had been dealings between the parties, and that 40l. were due to the plaintiff, awarded payment of that sum. *Elliott v. Chivell*, 1 Lutw. 541. And it does not appear to be necessary, that the award itself should express that a sum awarded to be paid, or an act to be done in favour of one of the parties, shall be in satisfaction, or that it should contain any equivalent terms; a discharge of the other party must necessarily be presumed. Roll. Arb. K. pl. 17. But *quære*, whether the award must not express for what cause the pay-

ment is to be made. *Nichols v. Grunniom*, Hob. 49.

In the cases above, the awards recited that they were made "of and concerning the premises:" but it seems that such awards would be good, although they did not contain any such recital, if they contained a recital of the matters that were referred. *Gray v. Gwennap*, 1 Barn. and Ald. 106.

(n) Serjt. Williams observes, n. 4. *Berks v. Trippet*, 1 Saund. 32 a., "These nice distinctions are now disregarded, courts of justice being at present more liberal in the construction of awards than formerly. And, therefore, an award may be good, though made of less than is contained in the submission; as if the submission be of all actions, trespasses, demands, and controversies, and the award be made of some only, the award is good; for no more shall be presumed to have been made known to the arbitrator: but if in fact other causes of action were made known to the arbitrator, then such award would be bad, as well where the submission is conditional with an *ita quod*, as where it is absolute." *Hawkins v. Colclough*, 1 Burr. 277. 1 Bac. Ab. 141. Vid. *Simmonds v. Swaine*, 1 Taunt. 554. *Bradford v. Ryan*, Willes 470.

When the submission was of all actions, &c. and also of two distinct matters of difference, and the award reciting the submission omitted to decide one of such distinct matters, the Court held that the award was bad, and refused to enforce performance by an attachment. *Randall v. Randall*, 7 East. 80. and vid. *Middleton v. Weeks*, Cro. Jac. 200. *Winter v. Munton*, 2 B. Moore 723. It is a good defence to an action brought for the nonperformance of an award, that the arbitrators had not decided all those matters submitted to them, of which they had notice. *Mitchell v. Stavelly*, 16 East. 58. *Ingram v.*

is of divers particular things, so it is of divers particular persons. And therefore if two on the one part, and one on the other part, submit themselves, the arbitrator may make an arbitrament between one of the two of the one part, and the other of the other part, and it will be good (c). 2. Although there were many matters in controversy; yet if one only be (a) signified to the arbitrator, he may make an award of that, for the arbitrator is in lieu of a Judge, and his office is to determine *secund' allegata et probata*, and the duty of the parties who are grieved, and know their particular griefs, is to signify their *causes of controversy to the arbitrator, for they are privy to them, and the arbitrator a stranger, and each ought to do that which lies in his knowledge; and if other construction should be made, many arbitraments might be avoided; for one might conceal a trespass committed, or other secret cause of action given him, and so avoid the award, *Et expedit reipublicæ (b) ut sit finis litium*. And this is like Cullamor's case on the † statute of Bankrupts, in the Second Part of my Reports, fol. 25 & 26 b. which provides, that equal distribution shall be made of the bankrupt's goods between all the (c) creditors, but that is, (as it is there resolved) to be intended of those who will come in and signify their debts. And hereby you will better understand your books in 39 H. 6. 9. 22 E. 4. 25. 19 H. 6. 6 b. 2 R. 3. 18. 4 Eliz. Dyer 216. 8 Eliz. Dyer 242.

(a) Cr. Jac. 200.
Hob. 49.
March. Arbit.
180.

[* 93 b.]

(b) 6 Co. 7 a.
9 a. 45 a.
8 Co. 37 b.
9 Co. 79 b.
11 Co. 69 a.
3 Bulstr. 98.
Godb. 242.
Hard. 128.
Co. Lit. 103 a.
† 13 El. cap. 7.
(c) Hob. 287.
Hutt. 37.

Milnes, 8 East. 445. In *Dowse v. Core*, 3 Bing. 29. Best, C. J. observed, "The old law is clear, that if the reference be general, without any express stipulation that the arbitrator shall decide on all matters referred to him, the award may be good for part; and this law has not been altered; for the case of *Mitchell v. Slavelly* contained an express stipulation that the arbitrator should decide on all the premises. Lord Ellenborough says, 'It was a condition of the submission that they were to award upon all matters in difference between the parties.' But it seems that *Mitchell v. Slavelly* was not decided upon the grounds of the submission containing an *ita quod*, but because the matter in difference not decided upon had been notified to the arbitrators.

It was held, *Holland v. Brooks*, 6 T. R. 161., that a party cannot impeach an award for matters not appearing upon the face of it, upon shewing cause against a rule for an attachment for not performing it: but he should obtain a rule for that purpose within the time limited by the act of parliament.

(c) Acc. Roll. Ab. Arbit. D. 5. *Athelston v. Moon*, and Willis. Com. 547. *Carter v. Carter*, 1 Vern. 259. In *Winter v. White*, 1 Brod. and Bing. 350. S. C. 3 B. Moore 674. it was held that a submission of all matters in difference between parties imports all matters, which any individual party may have, jointly or severally, against any other, for the submission is to be construed distributively: therefore where, upon a reference by bonds, it was awarded that a sum of money should be paid by one obligor to a co-obligor, the award was held good.

Richardson, J. dissented, observing upon the case of *Carter v. Carter*, that the marginal note was not warranted by the case itself; and as to the case cited from Brooke, that there was a note to it as follows:—"but it seems clear that the arbitrator had not authority to determine or arbitrate matters between the three (the parties on one side) for they make one party against a fourth: but he may determine between any of the three, and this fourth." And further observed, that this distinction appeared to him to be founded in reason and principle.

[99 a.]

SIR RICHARD LECHFORD'S CASE,

Hil. 7 Jac. 1.

UNDRELL
v.
ELSEY.
Pt. VIII.—99 a.

The custom of a manor was, that those who claimed copyholds by descent ought to come at the first, second, or third Court, upon proclamation made, to take up their estates; or else their estates should be forfeited. A tenant of the manor, having issue inheritable by the custom, died, such issue being at that time beyond sea; the proclamations all passed, and the heir did not appear for two years, but remained beyond sea; immediately upon his return he prayed to be admitted to the copyhold, and proffered the lord his fine in court, which the lord refused to accept, or to admit the heir, but seised the land as forfeited. Held, there was no forfeiture.

If the heir had been within the realm at the time of the first proclamation, and afterwards had gone out of the realm, the proclamations would have bound him.

At common law, if a man was within the realm at the time of the fine levied, and within the year went beyond the seas, he was bound; so if a man was disseised, and then went beyond the seas, and a descent was cast, his entry was tolled.

*If he who is beyond sea shall not be bound by non-claim on a fine, which is a matter of record; *a fortiori* he shall not be bound by non-claim on a descent, which is a matter in *pais*.*

If a man disseised, and afterwards imprisoned, a descent cast shall toll his entry.

*If a man seised of land, having issue two sons, bastard eigne and mulier puisne, dies, the mulier being beyond sea, or within age, or imprisoned, or *non sanæ memoriæ*, and the bastard eigne enters, and has issue and dies, and the land descends to his issue, the right of the mulier is bound for ever.*

So if a bastard born before marriage enters and has issue, &c. the collateral heir, and the lord by escheat are bound. S. C. Cro. Jac. 226.

Cro. Jac. 101.
Whitton and
Williams, S. P.
Carth. 42.

IN an ejectment in the King's Bench by Thomas Undrell, plaintiff, and Bristow Elsey, defendant, on a demise made by William Copley, 2 N. anno 2 Jac. Reg. of a house, and twenty acres of land, &c. in Lee in the county of Surry, for the term of one year; the defendant pleaded, that Richard Lechford, Knight, was seised of the tenements in which, &c. in his demesne as of fee, and leased to the defendant for his life, and that William Copley disseised him, and made the lease to the plaintiff, and that the defendant re-entered, &c. and the plaintiff replied and said, that the tenements in which, &c. are, *et a*

tempore cujus, &c. were parcel of the manor of Sherwood in Lee aforesaid, whereof Henry Lechford, Esq. was seised, and that the said tenements, in which, &c. are, *et a tempore cujus*, &c. were demised and demiseable, &c. by copy of court roll, &c. And that the said Henry Lechford at the Court of his manor, anno 2 Eliz. granted the said tenements to Thomas Copley, father of the said William Copley, to have and to hold to him and his heirs, by copy of court-roll, &c. And afterwards the said Thomas Copley died seised thereof of such estate, which descended to the said William Copley his son and heir, the lessor, &c. the estate of the said Henry Lechford in the said manor the said Sir Richard Lechford, Knight, now has, who entered upon the possession of the said William Copley the son, and ousted him of the tenements, in which, &c. and demised them to Bristow Elsey, as is aforesaid, upon whom the said William Copley re-entered and demised them to the plaintiff, &c. To which the defendants rejoined and confessed. that the tenements in which, &c. were parcel of the manor, and demised and demiseable, &c. and the grant by copy made to *the said Thomas Copley, and the descent to William Copley, *prout*, &c. But farther he said, that within the said manor there is, *et a tempore cujus*, &c. was such a custom, that if any customary tenant of the said manor dies seised of any lands or tenements, held by copy, &c. in fee-simple, &c. that every heir of such tenant so dying seised, shall pay a reasonable (a) fine for his admittance to be in full Court of the said manor by the Lord or his Steward imposed and assessed; and farther within the said manor there is another custom *a tempore cujus*, &c. that if any copyhold tenant, seised of any lands or tenements held by copy, &c. of the said manor in fee-simple dies thereof seised, and his heir doth not come at the next Court of the said manor, and claim the said tenements, and pray to be admitted to them, &c. then a (b) public proclamation shall be made in full Court that the said heir come at the same Court to claim the same lands, and to pray to be admitted, and so at two other Courts following of the said manor, the like proclamation shall be made; and if such heir at any of the said Courts in which proclamation shall be so made, comes not to claim the said tenements, and pray to be admitted to them, then the lord of the manor has always been used and accustomed to seise them into his hands, as forfeited to him; and pleaded, that three proclamations were made at three several Courts, &c. according to the custom; and the said William Copley, son and heir of the said Thomas Copley, came not to any of them to claim the same lands, and pray to be admitted to them; wherefore the said Sir Richard Lechford then and yet lord of the said manor, seised the tenements aforesaid, in which, &c. as (c) forfeited to him, and leased them to the defendant, as aforesaid. To which the plaintiff said, that the said Thomas Copley, *primo Julii*, 27 Eliz. died, as is aforesaid, seised of the said tenements, after whose death the tenements aforesaid, in which, &c. (d) descended to the said William Copley, as aforesaid; and that at the time of the

[* 99 b.]

(a) Cr. Jac.226.

(b) Cr. Jac.226.

Antea 44, &c.

(c) Co. Lit.59a.
Bridgm. 52.

(d) Carth. 74.

death of the said Thomas Copley, and at the time of the said several proclamations, the said William Copley was resident at Brussels beyond the seas, *extra quatuor maria, et ibi per totum tempus remanebat*, and there for all the said time remained until the first day of September, *anno 1 Jacobi Reg.* which day he returned from Brussels aforesaid, into England; and that immediately after his return to Lee, aforesaid, then having notice, and not before, of the death of the said Thomas Copley, the said William, 30th of September, 1 Jac. came to the said Sir Richard Lechford, then lord of the said manor, and prayed to be admitted to the tenements aforesaid, in which, &c. and offered the said lord any reasonable fine for his admittance to them, which the said lord utterly refused, &c. upon which the defendant demurred in law; and it was adjudged, *that this custom and non-claim †should not bar him, who was beyond sea (*extra maria*) at the time of the proclamations made, of his inheritance; because he who is out of the realm could not have (a) knowledge by intendment of law of the death of his father, nor of the proclamations made, to warn him to come to claim his inheritance, and pray to be admitted to it (A). And it appears by the statute *De modo levandi fines*, made (b) 18 E. 1. that a fine levied of lands in the Common Pleas, is as high a bar, and of as great force, and of so high nature in itself, that it bars not only those who are parties and privies to the fine and their heirs, but all other people of the world who are of full age, out of prison, of good memory, and within the four seas the day of the fine levied, if they do not make their claim within the year and day, &c. And it appears also by the statute *De Donis conditionalibus*, made (c) 13 E. 1. upon which it was concluded, that if the sublimity of a fine, which is so high a bar, and of so great force, and of so puissant a nature, and which hath such solemnity in so high a court of record, shall not bar him who is out of the realm of his right; *a fortiori* proclamations made in a base court in a private corner, shall not bar him.

[* 100 a.]

The custom and non-claim shall not bar the heir who was beyond sea at the time of the proclamations made.

† Cr. Jac. 226.
Cro. Jac. 101.
(a) Cr. Jac. 226.
(b) 2 Inst. 510, 511.

(c) Co. Lit. 260
a. 2 Inst. 331,
332, 333.

(A) By the general custom the lord is only authorized to seise the land, until the tenant comes in to be admitted; to warrant an absolute forfeiture of a copyhold, by the mere non-appearance of the heir to be admitted, there must be a particular custom, and there must be the greatest accuracy in the lord's proceedings. Yet on proclamation being made for the heir to come in, it is not necessary to specify the particular estates of which the former tenant died seised; nor, in order to seise, to prove the proclamations *viva voce*. *Titus v. Perkins*, Skin. 250. *Doe v. Hellier*, 3 T. R. 162. *contra*. Lord Salisbury's case, 1 Keb. 287. vid. S. C. 1 Lev. 63. But it is absolutely necessary, in order to warrant the lord in seizing, that proclamation be made on the regular presentment: for till presentment and proclamation be actually made, the heir is

not obliged to claim. *Rumney and Eves'* case, 1 Leon. 100. *Anderson and Hayward's* case, 3 Leon. 221. S. C. 4 Leon. 30. 1 Watk. Copy. 236.

With respect to infants and femes covert entitled by descent, or by surrender to the use of a will, it is provided by stat. 9 Geo. I. c. 29., that no forfeiture shall be incurred by reason of their not coming in to be admitted on such proclamation; and the statute then prescribes the manner of their admission, and the lord's remedies for his fines. This act is confined to the cases expressed, viz. Title by descent or surrender to the use of a will; and does not apply to a title under a deed. *Lord Kensington v. Mansell*, 13 Ves. 241. Vid. Watkins on Copyhold, Vol. I. p. 234, 320. Gilbert's Tenures, 230, 231. Scriven on Copyholds, Vol. I. 30, 343. Com. Dig. Copyhold, M. 4.

So judgment final in a writ of (a) right in the Common Pleas shall bind all strangers, if they make not their claim within the year and day after the judgment and execution; and yet the common law excepts infants, those who are out of the realm, or are imprisoned, &c. and therewith agree 5 E. 3. 222. and 7 E. 3. 335. that the year and day shall be accounted after the (b) execution, for by the transmutation of the possession, the country has notice of it. *Vide* 4 E. 3. 46. & 11 R. 2. Escheat 13. Plow. Com. 356. And the reason why a recovery in a writ of right where the trial was by battle (b) or grand assise, was final to all strangers, is, for the grand notice that men have of battle, and of the trial by grand assise, their proceedings and performance are with so notorious, famous, and public solemnities, and if such recovery with such solemnities should not bar him who was out of the realm, nor infants, nor a man *non sanæ memoriæ*, nor a man in prison; *a fortiori* custom and proclamations in a private court of a manor shall not bind them. And the law in these cases was grounded upon great reason; for he who is out of the realm, in another country, cannot by intendment of law have notice of things done within this realm; an infant has not understanding, nor can know his right either to follow it by entry, or action; so of a man *non sanæ memor'* who wants reason and sense to make a claim; so of him who is imprisoned who by judgment of law ought to be in *salvo* (c) *et arct'* *custod'* *sc. salv'* as to the party at whose suit *he is imprisoned, because he ought to be imprisoned so strong that he may not escape; and *arcta*, in respect he ought to be kept close, without conference with others, or (d) intelligence of things abroad; and he ought not to go out of the prison to make his claim. And that is the reason that a recovery (e) by default against him in a real action shall not bind him, but he shall reverse it by error, as it appears in 5 Ed. 3. 50 b. 4 Ed. 2. Disceit. 51. Lit. 102 b. *Nota*, reader, that a (f) feme covert is not mentioned in any of the said acts, but was bound at common law by non-claim, because she had a husband who might make it, and that was one of the reasons that the statute of 34 Ed. 3. c. 16. ousted non-claim; but the statute of 4 H. 7. c. 24. excepts (g) feme coverts who are strangers to the fine, so that she makes her claim within five years after the death of her husband. And at the common law, men out of the (h) realm, infants, men *non sanæ memoriæ*, and in prison, who were not bound to make claim within the year and day, were perpetually for them and their heirs exempted from making claim. And therefore it was resolved, that the said custom in the case at bar is so to be intended, that it shall bind him who doth not make his claim, &c. if he be within

Judgment final in a writ of right in C. B., binds all strangers who do not make their claim within the proper time, yet the common law excepts infants, those beyond sea, imprisoned, &c.

(a) Co. Lit. 254 b. 5 Co. 107 b. 17 Ves. 90.
(b) 1 Co. 96 b. 97 a.
Plowd. 337 b.

(c) 3 Co. 44 a. [* 100 b.]
Hard. 30.
2 Inst. 381.
Dalt. Sher. 147.
Cr. Car. 466.
1 Roll. 807.
3 Inst. 35.
Co. Lit. 260 a.
9 Co. 87 b.

A feme covert was bound at common law by non-claim: but the stat. 4. H. 7. c. 24. excepts feme coverts who are strangers to the fine, so as they make their claim within five years after the death of their husbands.

(d) 9 Co. 87 b.
Co. Lit. 259 a.
Plowd. 360 a.

(e) Lit. sect. 438. Co. Lit. 259 b. Lit. 102 b. 7 H. 6. 38 a. b. Fitz. Default 1. Br. Default 33.
Plowd. 360 a. (f) Hob. 95. Plowd. 360 a. Co. Lit. 262 b. (g) 9 Co. 140 b. (h) 1 Roll. 567. Plowd. 360 a. Hob. 95.

(a) By stat. 59 Geo. 3. c. 46., it is enacted that for the future, in no writ of right shall the tenant be received to wage battle; nor

shall issue be joined, nor trial be had by battle, in any writ of right.

If the heir had been within the realm at the time of the first proclamation, and afterwards had gone out of the realm, the proclamations would have bound him. † 3 Mod. 221, &c. 1 Show. 31, 83. Salk. 386. Comb. 118. Lutw. 765. (a) Cr. Jac. 101.

At common law, if a man was within the realm at the time of the fine levied, and within the year went beyond the seas, he was bound; so if a man were disseised, and then went beyond seas, and a descent was cast, his entry was tollid. If he who is [* 101 a.] beyond seas, shall not be bound by non-claim on a fine which is a matter of record, *a fortiori*, he shall not be bound by non-claim on a descent which is a matter *in pais*. If a man be disseised, and afterwards imprisoned, a descent cast shall toll his entry. Touch. 30. (b) Co. Lit. 262 b. Lit. sect. 441. (c) Co. Lit. sect. 440. (d) Lit. sect. 437. (e) Plow. 372 a. (f) Cr. Jac. 226. Palm. 533. (g) Co. Lit. 260 b. 261 a.

the realm, † of full age, of perfect memory, and out of prison; for no custom by the law can extend to bar those, who by judgment of law are not bound to make claim. But it was resolved, that if William Copley had been within the realm at the time of the first proclamation, and afterwards (a) gone out of the realm, that the proclamation should bind him, although he be *extra quatu' maria*, at the time of the other proclamations, for he shall not defeat the lord of his fine or forfeiture by his own act (c). *Vide* 9 H. 7. 24 a. and the reason of Lit. lib. 3. fol. 104 a. was well observed, who having put the case of non-claim of him who is out of the realm, that it shall not hurt him in the case of fine, he saith as follows, by greater reason, &c. (b) that a disseisin and a descent, which is matter in fact, shall not so much grieve him who is so disseised when he was out of the realm at the time of the disseisin, and also at the time that the disseisor died seised, but that he may well enter notwithstanding the descent; upon which two things were collected. 1. That as at the common law, if a man was within the realm at the time of the fine levied, and within the year went beyond the seas, he should be bound: so if a man be disseised, and afterwards goes beyond the seas, a descent cast afterwards shall toll the entry, as appeareth also by Littleton 103 b. (c) The second thing is, that if he who is out of the realm shall not be bound by non-claim on a fine, which is a matter of record, *a fortiori* he shall not be bound by non-claim on a descent which is a matter *in pais*. (d) If a man be disseised and afterwards is imprisoned, and afterwards a descent is cast, it shall toll his entry, and therewith agrees 9 H. 7. 24 a. And (e) some say in this case, that if a man be seised of land, and has issue two sons, bastard eigne and mulier puisne, and the father dies seised, the mulier being *beyond sea, or within age, or imprisoned, or *non sana memoria*, and the bastard eigne enters, and continues in peaceable possession of the lands, and has issue, and dies, and the lands descend to his issue, the right of the mulier in all the said cases is bound for ever; and some hold the contrary. 2. It was resolved, that forasmuch as William Copley was out of the realm at the time of the death of his father, although he was not in the King's service, yet he shall not be (f) barred by the said customs and proclamations, because he could not by intendment of law have notice; and at the common law he should not be barred by non-claim on a fine, or writ of right, Bracton lib. 5. tract. de Exception' cap. 29. fol. 436. (g) *Excusatur quis quod clameum non apposuerit, ut si in toto tempore litigii fuit ultra mare quacunq[ue] occasione: Littl. acc. fol. 103 a. Vide* 9 H. 4. 3 a. 26 H. 6. Error 27. 33 H. 6. 1. 1 Ass. p. 2. 21 H. 6. 24. 2 E. 3. Coron. 153. The pre-

(c) So in the case of the statutes of limitations, when once they have begun to run, no subsequent disability will stop their run-

ning. *Doe v. Jones*, 4 T. R. 300. *Cotterell v. Dutton*, 4 Taunt. 826. *Smith v. Hill*, 1 Wils. 134.

amble of the statutes of 26 H. 8. cap. 13. and 5 and 6 E. 6. cap. 11. Note, reader, as to those cases which have been put of bastard eigne and mulier puisne, I conceive that the better opinion is, that in such cases the mulier shall be barred for ever; and the reason is, because the continuance in possession, and dying seised in peace, and descent to his issue makes him heir, and his issue shall inherit as heir, because he was legitimate by the law of holy church; for (as Bracton, *lib. 2. fol. 63.* saith) *matrimonium subsequens legitimus facit quoad sacerdotium* (because they are legitimate by the common law) *non quoad successionem, propt' consuetudinem regni quæ se habet in contrarium* (D). And by the law of England by the continuance in possession, and dying seised in peace and descent, &c. he is adjudged (a) heir to his father, for although the bastard dies seised without issue, so that the land doth not descend, the mulier shall have it; and therewith agrees Abridgm. Ass. fol. 3. and the rule in 13 Edw. 1. Bastardy 28. is so to be intended, (b) *justum non est aliquem antenatum mortuum facere bastardum, qui toto tempore suo, pro legitimo habeatur.* Vide 59 E. 3. 14. and 39 Ass. p. 10. And in the case of legitimation (which is in law so precious and of so great estimation) the law doth not respect infancy, or other defects in the mulier, but prefers legitimation of blood before any benefit of temporal inheritance; and therefore the law saith, that by the death of the bastard eigne in peace he becomes right heir, and by consequence the mulier is barred. Vide 5 E. 2. Br. Descent 49. (c) 31 Ass. p. 18. and 22. John Alleyn's case; and 33 Edw. 3. Verdict 48. the same case. (d) 36 Ass. p. 2. Plowden's Commentaries, Stowel's case. Vide 10 Ed. 3. 2. the dying seised of the bastard eigne binds the (e) right, and the descent not only takes away the entry, but the right also; and therefore a descent in that case may be a bar to the right, when it shall not take away the entry in case of disseisin, as a descent of (f) services, rent, reversion expectant on an estate tail, &c. *shall bar (g) the right of the mulier as appears in (14) 18 Edw. 2. Bastardy 26. but such descent shall not take away the entry or claim of the disseisee; and so in many other cases, as appears by the books afterwards cited in this case. And if a man has two (h) daughters, bastard eigne, and mulier puisne, and they enter and occupy as heirs, now the law in favour of legitimation will not adjudge the whole possession in the mulier, who then had the sole right, but in both: so that if the bastard dies seised, her issue shall inherit; and therewith agrees 17 Ed. 3. 59. abridged by Fitz. Tit. Bast. 32. And if in the same case the daughters, *scil.* the bastard eigne and mulier puisne enter and make (i) partition, this partition shall bind the mulier for ever, 2 Ed. 2. Bast. 19. 21 Ed. 3. 34 b. 30 Ass. p. 7. but if partition be made betwixt two daughters where one has no colour, as to the special estate-tail there the (f) Co. Lit. 244 a. 118 b. (g) Co. Lit. 15 a. 244 a. (h) Co. Lit. 244 a. (i) Co. Lit. 170 b. 244 b. Vin. Ab. Desc. C.

If a man seised of land having issue two sons, bastard eigne and mulier puisne, dies, the mulier being beyond sea, or within age, or imprisoned, or *non sane memorie*, and the bastard eigne enters and has issue and dies, and the land descends to his issue, the right of the mulier is bound for ever.

(a) Co. Lit. 244 a.
(b) *Id.*

(c) Plowd. 372 a. Br. Age 37. Br. Descent 26. Br. Entre conceivable 68.
(d) Plow. 372 a. Fitz. Bast. 17. Br. Descent 29. Br. Ent. conceivable 75.
[* 101 b.]
(e) Co. Lit. 244 a. Plow. 372 a.

If a man has two daughters bastard eigne and mulier puisne, and they enter and occupy as heirs, the law will adjudge the possession to be in both; and if they make partition, the partition shall bind the mulier for ever.

(b) Vid. Gilb. Ten. 20, 29. notes. Co. Litt. 244 b. 245 a. 1 Bla. Com. c. 16. p. 458. Vin. Ab. Descent, C. D. D 2.

(a) Co. Lit. 244
b. 2 Inst. 97.

(b) Br. Vouch.
154. Co. Lit.
244 b. 2 Roll.
747. 21 E. 3.
46 a. 5 H. 7.
2 a.
(c) Co. Lit. 244
b. 2 Roll. 145.
Co. Lit. 244 a.

If a bastard born before marriage enters and has issue, &c. &c. the collateral heir, and the lord by escheat are bound in the case aforesaid; if the father of the bastard eigne and mulier puisne be endowed, the issue of the bastard shall have the reversion.

(d) Co. Lit.
244 a.

(e) *Ib.*
[* 102 a.]

Why the younger son born during marriage is called mulier puisne.

(f) Co. Litt.
243 b.

partition is void, 11 Ass. p. 23. Hugh de Wimondham's case. And an assise of (a) Mortdancer doth not lie betwixt the mulier and the bastard eigne, no more than betwixt two brothers; and therewith agrees Britton, c. 70. and if the bastard eigne enters, and is seised of lands as heir, he shall be vouched as heir, and if he be within age, the parol shall demur, 20 Ed. 3. Voucher 129. (b) And if a man has issue bastard eigne and mulier puisne, and dies, and the bastard within age enters and is impleaded, he shall have (c) age; and therewith agrees the book in 11 E. 3. Age 3. Which cases prove, that when the bastard eigne enters into the lands, until he be interrupted, he is accounted heir, although the mulier be within age, for when the bastard eigne is within age, of necessity the mulier puisne also ought to be within age. *Vide* 5 Hen. 7. 2. And if a man has issue bastard eigne and mulier puisne, and the bastard has issue, and dies, in the life of his father, and afterwards the father dies, and the issue of the bastard enters and dies without interruption; some say it shall bar the mulier. So if a bastard born before marriage enters, and has issue, and dies seised, it shall bar (d) the collateral heir, and the lord by escheat, as well as the mulier puisne: so if the bastard eigne enters and dies seised, his wife with child with a son, and afterwards the son is born, he shall inherit the land, for inasmuch as his father died in possession without interruption, the mulier shall not allege against the issue bastardy in his father who is dead. And if the bastard eigne dies seised, and his issue (e) endows the wife of the bastard; yet the mulier shall not enter upon the tenant in dower, for the right of the mulier was barred by the dying seised and the descent: otherwise it is of a descent which tolls entry only, and not the right. The same law in the case aforesaid, if the wife of the father of the bastard eigne and mulier puisne be endowed, yet the issue of the bastard shall have the reversion of it, *causa qua supra*, *vide* 10 E. 3. Waste 142. 20 H. 3. Bast. 29. 2 Ass. p. 9. 14 E. 2. Bastardy 26. *13 Edw. 1. Bastardy 28. 32 Edw. 1. Bastardy 31. 39 Edw. 3. The last case. 36 Ass. p. 2. 6 E. 3. 54. Abridg. tit. Faux. Recov. 2. 10 Edw. 3. 2. Plowd. Com. Talbot's case 57. and Stowell's case 373, 374. Note, reader, the reason why the younger son who is born during the marriage of a lawful wife is called mulier puisne, *seu filius mulieratus*, is, because this word (f) (*mulier*) in Latin has three significations,—1. *Sub nomine mulieris continetur quælibet femina*. 2. *Proprie continetur mulier quæ virgo non est*. 3. *Appellatione mulieris in legibus Angliæ continetur uxor*. So that *filius natus ex justa uxore appellatur in legibus Angliæ, filius mulieratus*; sicut *bastardus dicitur a Græco vocabulo, bassaris, i. e. meretrix, seu concubina, quia procreatur ex meretrice sive concubina*. And therewith agrees Glanvil. l. 7. c. 1. *quod si verum est, &c. tunc melioris conditionis est in hoc bastardus filius quam mulieratus, &c.* where he makes an opposition of a son mulier, to a bastard son, and there mulier is taken for legitimate, *procreat' de uxore, et bastardus ex meretrice sive concubina*. And therewith agrees Britton, cap.

70. of Mortdauncester, fol. 81 b. where he saith, in the same manner of two brothers of divers mothers, and between a brother mulier, and a brother bastard, &c. and the books in 32 Edw. 1. Bastardy 31. 6 Edw. 2. Bastardy 24. 39 Edw. 3. 14. 39 Ass. p. 10. 44 Edw. 3. 12, &c. Littleton *ubi supra*, &c.

JOHN TALBOT'S CASE,

[102 b.]

Trin. 7 Jac. 1. Rot. 3661.

In the King's Bench.

Salop, ss. JOHN PENDLETON was attached by the writ of the lady the Queen of second deliverance, to answer to John Chapman, of a plea, wherefore he took the cattle of him the said John Chapman, and them unjustly detained against gages and pledges, &c. And whereupon the said John Chapman by Thomas Salter his Attorney complaineth, that the aforesaid J. Pendleton, on the 2d day of September, in the 6th year of the reign of the lord the now King, at Albrighton, in a certain place there called Bromley in the county aforesaid, took his cattle, that is to say, two heifers, and them unjustly detained against gages and pledges, until, &c. whereupon he saith that he is injured, and hath damage to the value of 20*l*. and thereof he bringeth suit, &c. And the aforesaid J. Pendleton, by Nicholas Gibbens his attorney, cometh and defendeth the force and injury when, &c. and as bailiff of John Talbot, Esq. doth well acknowledge the taking of the cattle aforesaid, in the aforesaid place in which, &c., and justly, &c. because he saith, that the place in which it is supposed the aforesaid taking was done, doth contain, and at the time of that taking above supposed to be done, did contain in itself three acres of pasture, lying in the aforesaid field called Bromley, in Albrighton, aforesaid, and that long before the time of taking the cattle aforesaid supposed to be done, one John Chapman, father of the now plaintiff, was seised of the aforesaid three acres of pasture, with the appurtenances, in which, &c. in his demesne as of fee, and the said three acres of pasture with the appurtenances, in which, &c. held of the aforesaid John Talbot as of his manor of Albrighton in the county aforesaid, by fealty and service of doing suit at the court of the said John Talbot, of his manor aforesaid, and by service to render at the death of every tenant dying seised the best beast as a heriot, of which services J. T. was seised by the hands of J. C.

Count in second deliverance.

The defendant makes conscience as bailiff to J. T. and says, that the place where &c. contained three acres of pasture lying at B. in A.

And long before, &c. one J. C. father of the plaintiff was seised in fee of the said three acres, and held them of the said J. T. by fealty and suit of Court,

[* 103 a.] *from three weeks to three weeks, at that manor to be holden, as also by the service of rendering after the death of every tenant of the said three acres of pasture with the appurtenances in which, &c. dying thereof seised, the best beast which should be of such tenant at the time of his death in the name of a heriot, of which services the aforesaid John Talbot was seised by the hands of the aforesaid John Chapman the father, as by the hands of his very tenant, that is to say, of the fealty and suit of Court aforesaid, as of fee and of right, and of the heriot aforesaid, in his demesne as of fee. And the said John Chapman the father, of the three acres of pasture with the appurtenances, in which, &c. in his demesne as of fee being seised in form as aforesaid, afterwards, and before the said time when, &c. at Albrighton aforesaid, of such his estate, died thereof so seised. And the said John Pendleton further saith, that the aforesaid John Chapman the father, at the time of his death, at † Albrighton aforesaid, was possessed of an ox, of the price of 100s. as of his proper ox, which ox was the best beast of the aforesaid John Chapman the father, at the time of his death, whereupon fell the heriot thereof to the aforesaid John Talbot; and because the heriot aforesaid, after the death of the aforesaid John Chapman the father, at the said time when, &c. was behind not delivered; the said John Pendleton, as bailiff of the aforesaid John Talbot, doth well avow the taking of the cattle aforesaid, in the aforesaid place in which, &c. and justly, &c. for the heriot aforesaid not delivered, as within his fee and lordship, &c. And the said John Chapman now plaintiff saith, that the aforesaid John Pendleton, as bailiff of the aforesaid John Talbot, for the reason before alleged, ought not acknowledge the taking of the cattle aforesaid, in the place in which, &c. to be just, because he saith, that long before the aforesaid time of the taking aforesaid done, and before the aforesaid John Chapman the father had any thing in the said three acres of pasture with the appurtenances in which, &c. one John Barney was seised of a messuage, and of half a yard land of meadow and pasture, with the appurtenances, containing by estimation fifty acres in Albrighton aforesaid, whereof the said three acres of pasture, with their appurtenances in which, &c. were parcel, in his demesne as of fee; and the said messuage, and one half yard land, of meadow, and pasture wholly, with the appurtenances whereof, &c. held of the aforesaid John Talbot, as of his manor of Albrighton aforesaid by fealty, and doing suit at the Court of the said John Talbot of his manor aforesaid, from three weeks to three weeks, at that manor yearly to be holden, as also by the service of rendering after the death of every tenant of the said messuage, and half yard land of meadow and pasture wholly with the appurtenances whereof, &c. dying thereof seised, the best beast that was *of such tenant, at the time of his death in the name of a heriot.

J. C. died seised in fee, and at the time of his death, was possessed of an ox of the price of 100s. which was the best beast of the said J. C. at the time of his death.

† Cro. Car. 260. pl. 94. post. 104.

And because the said heriot was behind and not delivered, the defendant, as bailiff to J. T., took the cattle aforesaid, &c.

The plaintiff pleads in bar, that before the said J. C. had any thing in the said three acres, one J. B. was seised in fee of a messuage, and fifty acres of land of which the said three acres were parcel, which said messuage and land were held of the said J. T. by fealty and suit of Court, and by service to render at the death of every tenant dying seised, the best beast as a heriot.

[* 103 b.]

And the said J. B. being so seised, enfeoffed the said J. T. of three acres of

the said land to have and to hold to him and his heirs.

&c. that is to say, on the first day of May, in the 32d year of the reign of the lady the late Queen, of three acres of the said land, parcel of the aforesaid half-yard land of meadow, and pasture, with the appurtenances whereof, &c. enfeoffed the aforesaid John Talbot, to have and to hold to the said John Talbot, his heirs and assigns for ever: by virtue of which feoffment, the aforesaid John Talbot was, and yet is seised of the aforesaid three acres of land, parcel, &c. in his demesne as of fee; and he the said John so being thereof seised, and the aforesaid John Barney of the messuage aforesaid, and the rest of the aforesaid half-yard land, meadow, and pasture, with the appurtenances whereof, &c. in form aforesaid being seised, the said John Barney afterwards, and before the time of the taking aforesaid done, that is to say, on the first day of May, in the 36th year of the reign of the said lady the late Queen, of the aforesaid three acres of pasture with the appurtenances, in which, &c. enfeoffed the aforesaid John Chapman the father, and his heirs for ever; by virtue of which feoffment, the said John Chapman the father, was seised of the said three acres of pasture, with the appurtenances in which, &c. in his demesne as of fee, and so thereof being seised, the said John Chapman the father, after and before the said time of the taking, &c. at Albrighton aforesaid, of such his estate, of and in the same three acres of pasture, with the appurtenances in which, &c. died thereof seised, after whose death the said three acres of pasture, with their appurtenances in which, &c. descended to the said John Chapman now plaintiff, as son and heir of the said John Chapman the father: by which the said John Chapman now plaintiff, into the said three acres of pasture, with the appurtenances in which, &c. entered, and was, and yet is thereof seised in his demesne as of fee; and so thereof being seised, the said John Chapman the now plaintiff, before the said time of the taking, &c. put his cattle into the aforesaid place in which, &c. to eat the grass in the same then growing, as it was lawful for him to do, which cattle were in the place aforesaid, in which, &c. eating the grass there growing, until the said John Pendleton, on the aforesaid 2d day of September, in the 6th year of the reign of the lord the now King above-said, at Albrighton aforesaid, in the aforesaid place called Bromley, did take the cattle of him the said John Chapman aforesaid, and them unjustly detained against gages and pledges until, &c. as he above against him complaineth; and this he is ready to verify, and the said John Pendleton says that inasmuch as the aforesaid John Chapman, the taking of the cattle aforesaid, in the *aforesaid place in which, &c. hath not alleged sufficient to bar, &c. and that he to that plea in manner and form aforesaid pleaded needeth not, nor by the law of the land, is bound to answer; wherefore, for want of a sufficient plea in bar in this behalf, the said John Pendleton demands judgment, and a return of the cattle aforesaid, together with his damages to be adjudged unto him. And the aforesaid John Chapman now plaintiff, inasmuch as he sufficient matter in law, to bar the aforesaid John Pendleton, from justly avowing the

And afterwards enfeoffed the said J. C. of the said three acres of pasture in which, &c. to have and to hold to him and his heirs.

Who died thereof seised, and they descended to the said plaintiff, who entered.

And put his cattle into the aforesaid place in which, &c.

Demurrer to the bar.

[* 104 a.]

Joinder in demurrer.

*Curia advisare
vult.*

taking of the cattle aforesaid, in the place in which, &c. above hath alleged, which he is ready to verify, which matter the aforesaid John Pendleton doth not deny, nor to the same any ways answereth, but doth wholly refuse to admit the same averment, as before prays judgment, and his damages, by the occasion of the taking and unjustly detaining of the same cattle, to be to him adjudged, &c. And because the justices here, will advise themselves of and upon the premises, before they give their judgment thereof; day is given to the parties, &c.

[104 b.]

JOHN TALBOT'S CASE,

Hil. 7 Jac. 1.

CHAPMAN
v.
PENDLETON.
Pl.VIII.—104b.

If there be lord and tenant by fealty and heriot services, and the lord purchases part of the land, the heriot service is extinct. Resolved,—1. Some entire services by alienation of parcel of the tenancy shall be multiplied, and some entire services by alienation of parcel shall not be multiplied.

The four manner of entire services, what they are, and when multiplied. 2. There is no difference between entire annual services, valuable, or of pleasure, which shall be multiplied, and such entire services not annual. 3. If the tenant had first enfeoffed a stranger of part of the lands holden, and then had enfeoffed the lord of another part, the heriot service would have remained for the land the stranger held. 4. If a heriot be due by the custom of the manor upon the death of the tenant, and the lord purchase part of the tenancy, such purchase will not extinguish the lord's right to a heriot. S. C. 2 Brownl. 293.

10 Co. 108 a. b.
1 Saund. 195 d.
n. (D) Vol. 1.
p. 352.
F. N. B. 72 d.
Com. Dig.
Susp. C.
Bac. Ab. Her. B.

JOHN CHAPMAN brought a writ of second deliverance against John Pendleton, of two heifers taken at Albrighton, in a place called Bromley in Albrighton, in the county of Salop, &c. The defendant made conusans as bailiff to John Talbot, Esq. and said, that the place where, &c. contained three acres of pasture, lying in a field called Bromley, in Albrighton; and that one John Chapman, father of the said John Chapman, whose heir he is, was seised of the said three acres of pasture in fee, and held them of the said John Talbot, as of his manor of Albrighton in the said county by fealty, and suit of court to the manor from three weeks to three weeks, and by the service to render after the death of every tenant of the said three acres of pasture, in which, &c. dying thereof seised, *optimum animal* such tenant had at the time of his death *nomine heriotti*, of which

services he was seised by the hands of the said John Chapman the father, as by the hands of his very tenant, &c. and the said John Chapman the father so being thereof seised, died seised thereof, and that at the time of his death he was possessed of an ox, of the (a) price of 100s. as of his proper ox, which *ox fuit optimum animal* of the said John Chapman the father, which he had at the time of his death, &c. And because the said heriot was behind, and not delivered, the defendant, as bailiff of the said John Talbot, acknowledged the taking of the cattle aforesaid, in the place where, &c. as *infra feodum et dominium suum, etc.* In bar of which the said John Chapman, now plaintiff, said, that before the said John Chapman his father had any thing in the said three acres of pasture, one John Barney was seised of a house, and a half-yard *land, of meadow and pasture, containing by estimation fifty [* 105 a.] acres, in Albrighton aforesaid, whereof the said three acres of pasture in which, &c. were parcel, in his demesne as of fee, and the said house and half yard land, meadow and pasture entire, held of the said John Talbot, as of his said manor by fealty, suit to court, and heriot service, after the death of every tenant dying thereof seised; and the said John Barney being so seised of the said messuage and half yard entire, anno 32 Eliz. of three acres of land parcel of the said half yard land, enfeofed the said John Talbot, to have and to hold to him and his heirs: and afterwards, anno 36 Eliz. of the said three acres of pasture, in which, &c. enfeofed the said John Chapman the father, to have and to hold to him and his heirs, who died thereof seised, and they descended to John Chapman, the now plaintiff, &c. Upon which the avowant demurred in law. And the only question in this case was, if the lord had, by the purchase of the said three acres of pasture, in which, &c. parcel of the tenements held of him by heriot service, extinguished his heriot or not? And the avowant's counsel did insist strongly upon the words of Littleton, lib. 2. cap. ult. fol. 49. where he saith, that notwithstanding the purchase of parcel, &c. by the lord, the (b) homage and fealty remain entire to the lord; for the lord shall have the homage and fealty of his tenant for the remnant of the lands and tenements held of him, as he had before, because such services are not annual services, and cannot be apportioned; which reason proves (as it was urged) that the heriot service in the case at bar continues, for this service is not annual, being due only on the death of the tenant, and cannot be apportioned because it is entire, *scil. optimum animal*. So they said, that it appears by Littleton, lib. 2. cap. 3. and (c) 7 Edw. 3. 29 a. b. that he who holds by knight's service, ought to go in person, or find another able person for him, properly arrayed for the war, &c. which is an entire service; and yet Littleton saith, *ubi supra*, fol. 49. that if the lord purchases part of the land so held (d) the escuage shall be apportioned; which proves that the tenure by knight's service, remains for the residue, and the reason is, as it was urged, because the entire service was not annual, and the service by the body of a man cannot be apportioned. Also they cited the book in

(a) Ante 103 a.
Cr. Jac. 260.
Plowd. 94 a.

(b) Litt. s. 223.
Co. Lit. 149 a.
b. Lit. 49 a. 2
Brown. 294,
295.

(c) Lit. s. 96.
Lit. 20 a. 9 Co.
49 b. Co. Lit.
70 a.

(d) Lit. s. 223.
Co. Lit. 142 b.
Lit. 49 a.

(a) 6 Co. 1 a.

34 Edw. 3. (a) Heriot 1. where it is held, that if my tenant who holds of me by a heriot, aliens parcel of his land to another, each of them is chargeable to me of a heriot, because it is entire ; and although the tenant purchases the land again, &c. I shall have of him, for each portion, a heriot. So in the

[* 105 b.]

case at bar, although the lord purchases *parcel of the land, yet he shall have a heriot for the residue, for it is entire and not annual. But it was answered and adjudged, *per totam curiam*, that in the case at bar, the heriot (b) service was extinct. And, first, the resolutions in (c) Bruerton's case, in the Sixth Part of my Reports, were affirmed to be good law by the whole Court. And in this case these points were resolved.

The heriot service is extinct.

(b) Co. Lit. 149 b.

(c) 6 Co. 1, 2.

1. Some entire services by alienation of parcel of the tenancy shall be multiplied, and some entire services by alienation of parcel shall not be multiplied.

When a thing entire, valuable, or of pleasure, shall be rendered by the tenant to the lord, such entire services shall be multiplied by alienation of parcel of the tenancy.

1. That some entire services by alienation of parcel of the tenancy shall be (d) multiplied, *scil*, that every several alienee shall pay several entire services; and some entire services, by alienation of parcel, shall not be multiplied, but the lord shall be content with one amongst all the several alienees: and as to that it must be known, that there are four manner of entire services:—1. When a thing entire, be it a chattel valuable, or a thing of pleasure, shall be rendered and paid by the tenant to the lord, a chattel valuable, as an horse, an ox, gilt spurs, a bow or arrows, a sword, a gauntlet, or such like; things of pleasure, as a falcon or other bird, a dog, or such things of pleasure: all such entire services by alienation of parcel of the tenancy shall be multiplied, and every alienee shall render the entire service (A): and yet, by the purchase (d) Co. Lit. 149.

(A) Mr. Watkins in his Treatise on Copyholds, Vol. II. p. 195. states that where the heriot is reserved on a grant in fee, the heriot would not be multiplied by alienation unless the tenant conveyed a fee; for in the case of a grant for years, life, or in tail, the donee would hold of the donor, and the donor would still continue tenant of the lord for the whole land. But in the case of a grant to A. for life, remainder over in fee to a stranger, so that the whole fee pass from the grantor, there A. the particular tenant shall hold of the lord and not of him, who made the grant or gift, and consequently a heriot would be due on the death of A. Mr. Watkins further distinguishes between those who take a portion of the fee by act of law, and those who take by the act of the party. Those taking by the act of the party do not become tenants to the lord, and therefore on their death no heriot is due. The husband taking his curtesy is in by act of law: and as he (at least in cases where he takes the whole estate) is tenant to the lord, a heriot would be due on his death, whereas a widow taking her dower, and so taking by act of law (except in cases where she does take the whole) is tenant to the heir, and therefore on her death no heriot would be due. Vin. Ab. Heriot B. Mr. Watkins also observes that if a person seised in

fee of freehold lands grant to A. for life, with remainder to B. for life, remainder to C. for life, with remainder to D. in fee: A., B., C., and D., shall hold of the lord as the whole fee is disposed of: but as the particular interest granted to A. and the several remainders limited to B., C., and D., form together but one estate, it should seem to follow that A., B., C., and D., form but one tenant to the lord, and consequently that but one heriot can be due, and that on the death of the survivor of them. Copyholds, Vol. II. 150. Mr. Scriven in his Treatise of Copyholds, Vol. I. p. 429. is of a different opinion. Mr. Watkins afterwards states, that if either alien his portion, it should seem that a heriot would be due on the alienation of each; as the respective alienors would cease to be tenants by their own act, and the respective alienees would be in of a new estate.

In Kitch. 262. it is laid down, that to have a heriot after the death of tenant for life or years is heriot custom, and that heriot service is after the death of tenant in fee. But it seems to be now agreed that heriot service may be reserved on the grant of a less estate. Vid. 2 Watk. Copyholds 134. Serjt. Williams' note 1. to *Lanyon v. Carne*, 2 Saund. 168. note (A). *Bruerton's case*, Vol. III. p. 262.

of parcel by the lord, the whole is (a) extinct, as it is resolved in the said case of Bruerton. The second is a personal service to be done by the tenant to the person of the lord, as homage, fealty, knight's service, to be (b) carver, sewer, butler, or such personal services, to the lord, and some of these shall multiply, and some not; and therefore homage and fealty by alienation of parcel shall multiply, because when the tenant doth homage or fealty, he doth them for all the tenements which he holds of the lord, so that these services extend to the entire tenancy, and every parcel of it; and although the lord purchases part, yet the homage and fealty remain for the residue: so that although Littleton, *ubi supra*, holds, that the homage and fealty by purchase of parcel, shall not be extinct, but shall remain for the residue, because such services are not annual, and cannot be apportioned, (yet) that is (c) *ratio una, sed non unica*, as appears before. So knight's service, which is an entire service to be performed by the body of a man, shall be also multiplied by the alienation of parcel; and although the lord purchases parcel, the knight's service shall not be extinct, but shall remain for the residue, *quia (d) pro bono publico et pro defensione regni*, and the escuage shall be apportioned. But the personal service of sewer, carver, butler, &c. or when the tenant is bound by his tenure, *ad convivandum dominium suum et familiam suam semel in anno, et ad *equitandum cum domino suo in com' N. sumptibus suis propriis*, &c. (*vide* 10 Edw. 3. 23. in John de Brompton's case) by alienation of parcel, it shall not be apportioned nor multiplied: for such services which are for the private benefit of the lord, and are personal to be done by a man, shall not be multiplied, because they are to be personally done by one man only; and multiplication of them would be a prejudice, and chargeable to the tenant, and the purchase of parcel of the tenancy by the lord, will extinguish all such personal private service. The third is, when the tenant is to exercise a personal office, as to be steward of the Court of the manor, or bailiff of the manor, or collector of the rents of the manor, or woodward of the manor, or the like offices, they, by alienation of parcel of the tenancy, shall not be multiplied, but the lord may distrain each of them, in these cases, to do it, but one only shall exercise it: and if the lord purchase any part of the tenancy, the whole service is extinct. The fourth is, when the tenant by his tenure is to do manual labour, or work touching houses, lands, or tenements; as to cover or repair the (e) hall of the lord's house, or to make or repair his park pale, or to plough or sow the lord's demesne, &c. or to reap his corn, or to cut his grass, or *molare blada sua*, or such like; these, or other services by alienation of parcel, shall not be multiplied; for these works are to be done on a certain thing, which cannot be multiplied.

2. It was resolved, that there is no difference between entire annual services, be they valuable, or things of pleasure, annual services, valuable or of pleasure, and which shall be multiplied, and such not annual.

A personal service to be done by the tenant to the person of the lord in some cases shall multiply.

(a) 6 Co. 1 b. Moor 203. Co. Lit. 149 a. Bac. Ab. Exting. A. (b) 6 Co. 2 a.

(c) Co. Lit. 149 a.

(d) Co. Lit. 149 a. b. 6 Co. 2 a.

And some shall not.

[*106 a.]

When the tenant is to exercise a personal office, the service shall not be multiplied by alienation of parcel of the tenancy.

So also when the tenant is bound to do manual labour or work touching houses, lands, or tenements.

(e) 6 Co. 2 a.

2. There is no difference between entire services

sure, and which shall be multiplied, as aforesaid, and between such entire services not annual: as if lord and tenant be to render a horse every three, four, or five years, or upon alienation or death: in these and the like cases, if the lord purchases parcel of the tenancy, such entire services, not annual, shall be as well extinct as the like annual services.

3. If the tenant had first enfeoffed a stranger of part of the lands holden, and then had enfeoffed the lord of another part, the heriot service would have remained for the land the stranger held.

4. If a heriot be due by the [*106 b.] custom of the manor upon the death of the tenant, and the lord purchases part of the tenancy, such purchase will not extinguish the lord's right to a heriot.

(a) Co.Lit. 149 b. 2 Brown.

296. Flowl. 95, 96. (b) Watk.Cop. 160. Co. Lit. 149 b. 2 Brown. 296. 8 H. 7. 11. † 6 Co. 1, 2, &c.

3. It was resolved, that if John Barney had first enfeoffed John Chapman the father, of the said three acres of pasture, and afterwards had enfeoffed the lord of the said three acres of land, and notwithstanding, the heriot service had remained for the land which John Chapman the father held; and the reason is, because John Chapman, by his purchase of three acres, held by one several and distinct tenure of heriot service, and therefore the purchase of the lord of any part of the residue which John Barney held, would extinguish only the heriot which he ought to render, and not the heriot which John Chapman by reason of his distinct and separate tenure ought to pay.

4. There is a difference between heriot service, and heriot (a) custom as to the extinguishment thereof, when *the lord purchases parcel of the tenancy: for if the lord purchases parcel of the tenancy, the heriot service is extinct: but if the custom of the manor be, that upon the death of every tenant of the manor, who dies seised of any lands held of the same manor, the lord shall have a heriot; although the lord purchases part of the tenancy, yet the lord shall have a heriot by the (b) custom of the manor for the residue, for he remains tenant to the lord, and the custom extends to every tenant. *Vide*, reader, the books cited in the case of Bruerton, † by which these differences, with the reason of them, will appear.

DR. BONHAM'S CASE,

[107 a.]

Mich. 6 Jacobi I.

In the Common Pleas.

London, ss. HENRY ATKINS, of London, doctor in physic; George Turner, of London, doctor in physic; Thomas Moundford, of London, doctor in physic; John Argent, of London, doctor in physic; John Taylor, of London, yeoman; and William Bowden, of London, yeoman; were attached to answer to Thomas Bonham, of London, doctor in philosophy, and in physic, of a plea, wherefore they, together with William Dun, of London, doctor in physic, and Richard Ware, of London, skinner, with force and arms, him the said Thomas Bonham took, imprisoned, evilly treated, and him in prison, against the law and custom of the kingdom of England, did long detain, and other wrongs to him did, to the great damage of him the said Thomas Bonham, and against the peace of the lord the now King, &c. And whereupon he the said Thomas Bonham, by Richard Coke, his attorney, complaineth, that the aforesaid Henry, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, together with, &c. on the 10th day of November, in the fourth year of the reign of the said lord the now King, with force and arms, him the said Thomas, in the parish of the Blessed Mary-le-Bow, in the ward of Cheap, took and imprisoned, and evilly treated, and him there so in prison, for a long time, that is to say, by the space of seven days, against the law and custom of this kingdom of England, detained, and other wrongs, &c. to the great damage, &c. and against the peace, &c. Whereupon he saith, that he is injured, and hath damage to the value of 300*l*. and therefore he bringeth suit, &c. And the *aforesaid Henry, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, by Francis Barker, their attorney, come and defend the force and injury, when, &c. And as to the coming with force and arms, they say, that they are not thereof guilty, and of this they put themselves upon the country; and the aforesaid Thomas Bonham likewise: and as to the rest of the trespass and imprisonment aforesaid, above supposed to be done, the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, say, that the aforesaid Thomas Bonham ought not to have his action aforesaid against them, because they say, that before the aforesaid

False imprisonment.

[* 107 b.]
Plea.

As to the force and arms, &c. defendants plead not guilty, and issue thereon.

And as to the residue of the trespass they plead in bar.

Setting out the letters patent of Henry VIII. to the College of Physicians.

See 3 Ld. Raym. The Entries 419. this charter pleaded.

time when it is supposed the aforesaid trespass and imprisonment to be done, the lord Henry the Eighth, late King of England, &c. on the 23d day of September, in the 10th year of his reign, by his letters patent (which the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, sealed with his great seal of England, bearing date at Westminster the same day and year, bring here into Court) reciting (that) Whereas he thought it the duty of his kingly office, in all reason, to provide for the good and welfare of his people, *that* would (*i. e.* ought) first of all to be done, if he might in due season meet with enterprizes of wicked men: first, therefore, he held it necessary to restrain the boldness of wicked men, who professed physic more for avarice than out of confidence of a good conscience; whereupon very many incommodities did arise, to the rude and credulous common people: therefore, partly imitating the example of the well governed cities in Italy, and many other nations, and partly inclined thereunto, at the request of the great men and doctors, John Chambre, Thomas Linacre, Ferdinand de Victoria, his physicians, and of Nicholas Hatswel, John Francisco, and Robert Yaxley, physicians, and chiefly of the right reverend father in Christ, and Lord Thomas (Wolsey) titled of the holy church beyond Tyber, priest of the most holy church of Rome, cardinal of York, Archbishop, and our well beloved Chancellor of our kingdom of England; a college perpetual of Doctors and grave men, who physic in his city of London, and the suburbs, and within seven miles from the said city every way, might publicly exercise, he willed and commanded to be instituted, to whom both for his honour, and in the name of the public good, and care (as he hoped) the ignorance and rashness of the malicious (which he remembered) as well by their example and gravity to deter, as by his laws late made, and by constitutions to be made by the same college to punish; which that they might more easily well accomplish, to the remembered Doctors John Chambers, Thomas Linacre, Ferdinand de Victoria, his physicians, Nicholas Hatswel, John Francisco, and Robert Yaxley, physicians, he granted, *that they, and all men of the same faculty, of and in the city aforesaid, should be in deed and name, one body and commonalty perpetual, or college perpetual, and that the said commonalty or college every year for ever might choose and make of that commonalty any prudent man, and skilful in the faculty of physic, to be president of the said college or commonalty, to oversee, recognize, and govern, for that year, the college or commonalty aforesaid, and all men of the said faculty, and their businesses; and that the said president and college or commonalty, should have perpetual succession, and a common seal, to serve for the businesses of the said commonalty and president for ever; and that they and their successors for ever should be persons able and capable to purchase and possess in fee and perpetuity, lands, tenements, rents, and other possessions whatsoever: he also granted to them and their successors, for him and his heirs, that they and their successors might purchase to them and their

[* 108 a.]

successors, as well in the said city as out of it, lands and tenements whatsoever, not exceeding the yearly value of 12*l.* notwithstanding the statute of alienation in mortmain : and that they, by the name of president of the college or commonalty of the faculty of physicians, London, might plead, or might be impleaded, before whatsoever Judges, in all courts and actions whatsoever ; and that the aforesaid president and college, or commonalty, and their successors, lawful assemblies, and honest of themselves, and statutes and ordinances for the wholesome government, oversight, and correction of the college or commonalty aforesaid, and of all men of the same faculty in the same city, or within seven miles circuit of the said city, exercising, according to the exigence or necessity (as often, and when need was) might lawfully, and without peril make, without the hindrance of the said late King, his heirs or successors whatsoever, his justices, escheators, sheriffs, and other his bailiffs and ministers, his heirs and successors whatsoever : he also granted to the said president and college, or commonalty, and their successors, that none in the said city, or seven miles in circuit thereof, do exercise the said faculty unless to this, by the said president or commonalty, or their successors, (who for the time should be) he be admitted by the letters of the said president and college, with their common seal sealed, upon the penalty of 100*s.* for every month, that not being admitted, he should exercise the same faculty, half thereof to the lord the King, and his successors, and half thereof to the said president and college, to be applied : he besides, willed and granted, for him and his successors (as much as in him was) that by the president and college of the aforesaid commonalty for the time being, and their successors for ever, four (persons) every year by them to be chosen, *should have the overseeing, searching, [* 108 b.] correction, and government of all and singular the physicians of the said city, exercising the faculty of physic within the said city ; and so of other physicians foreign whomsoever, the said faculty of physic anywise frequenting and using within the said city, and the suburbs thereof, or within seven miles in circuit of the said city, and the punishment of them for their offences, in not well exercising, doing, and using the same ; as also the oversight and searching of all medicines, and the reception (*recipes*) of them by the said physicians, or any of them, to the liege people of the said late King, for curing and healing their infirmities, to be given, put, and used, as often, and when need shall be, for the commodity and profit of the said liege people of the said late King, so as the punishments of the said physicians, using the said faculty of physic, so in the premises offending, by fines, amercement, and imprisonment of their bodies, and by other ways reasonable and fitting, be executed : he also willed and granted, for him, and his heirs and successors, (as much as in him was) that neither the president, nor any of the college aforesaid of physicians, nor their successors, nor any of them, exercising the same faculty any way in future, within the city aforesaid, and the suburbs thereof, or elsewhere, should be summoned or put, nor any of them should be sum-

moned or put in any assises, juries, inquests, inquisitions, attainments, and other recognitions within the said city, and the suburbs thereof, hereafter to be taken before the mayor or sheriffs, or coroners of the said city for the time being, or by any their officer, or minister, or officers, or ministers, although the said juries, inquisitions, or recognitions, were summoned upon the writ or writs of the said King, or his heirs, of record: but that the said master or late governors, and commonalty of the faculty aforesaid, and their successors, and every of them the said faculty exercising, against the said late King, his heirs and successors, and against the mayor and sheriffs of the said city aforesaid for the time being, and whatsoever their officers or ministers should be thereof acquitted and discharged for ever, as by the said letters patent, amongst other things, more fully appeareth. And the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William, farther say, that by virtue of the letters patents aforesaid, the aforesaid John Chambre, Thomas Linacre, Ferdinand de Victoria, Nicholas Hatswel, John Francisco, and Robert Yaxley, physicians, and all men of the said faculty in the city aforesaid, were one body and commonalty perpetual, or college perpetual; and that afterwards, by a certain act of parliament of the said late King Henry the Eighth, holden at London the 15th day of April, in the 14th year of his reign, and from thence adjourned unto Westminster, *in the county of Middlesex, the last day of July, in the 15th year of the reign of the said late King, and then there holden, amongst other things, it was enacted by authority of the same parliament. That for that, that the making of the said corporation of physicians was meritorious, and very good for the commonwealth of this kingdom of England, and besides, it was expedient and necessary to provide, that no person of the said body politic or commonalty aforesaid should be suffered to exercise and to practise physic, but only such persons as should be profound, *sad*, and *discreet*, groundedly learned, and deeply studied in physic, in consideration whereof, and for the farther authorising of the said letters patent, and also for enlarging and amplifying of farther articles for the aforesaid commonwealth, to be had and made by the said late King, with the consent of the Lords Spiritual and Temporal, and Commonalty in the said Parliament assembled, it is enacted amongst other things, that the aforesaid corporation of the commonalty and fellowship of the faculty of the art of physic aforesaid, and all and every grant, article, and other things contained and specified in the said letters patent, should be approved, granted, ratified, and confirmed in the aforesaid act, and should clearly be authorised and admitted by the same, good, lawful, and available to the aforesaid body corporate, and their successors, for ever, in as ample and large manner as it might be taken, thought, and construed by the said letters patent: and farther it is enacted, ordained, and established by the said act, that the aforesaid six persons, in the aforesaid letters patent named as principal, and first named of the aforesaid commonalty and fellowship, should choose to them two

That the aforesaid J. C., &c., were incorporated.

The statute H. 8. confirming the letters patent.

[* 109 a.]

other of the said commonalty, who from thenceforth should be called and named elects, and the aforesaid elects yearly should choose one of them to be president of the said commonalty : and as often as any of the rooms and places of the said elects should happen to be void by death, or otherwise, then the supervisors of the said elects, within thirty or forty days next after their deaths, or any of them, should choose, name, or admit one or more, as need should require, of the most learned and expert men of and in the aforesaid faculty in London, to supply the place and number of eight persons, so that he or they who should be chosen be first examined strictly by the said supervisors, according to the form devised by the said elects, and also by the said supervisors approved, as by the said act amongst other things more fully appeareth. And the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William, farther say, that afterwards, and before the time when, &c. by another act of parliament of the lady Mary, the *Queen of England, the 21th day of October, in the first year of her reign, at Westminster aforesaid, reciting, that whereas in the parliament holden at London, the 5th day of April, in the 14th year of the reign of the lord Henry the Eighth, late King of England, and from thence adjourned unto Westminster, the last day of June, in the 15th year of his reign, and there holden, it was enacted, that a certain grant by letter patents of incorporation, made and granted by the aforesaid late King, to the physicians of London, and all clauses and articles contained in the said grant, should be approved, granted, ratified, and confirmed by the said parliament ; in consideration whereof, it was enacted by the authority of the same parliament, that the aforesaid statute and act of parliament, in all the articles and clauses in the same contained, from thenceforth for ever should stand and continue in full strength, force, and effect, any statute, law, custom, or any thing made, had, or used to the contrary, in any thing notwithstanding : and for the better reformation of divers enormities happening to the commonwealth, by the evil usage and undue administration of physic, and for the amplifying and enlarging of the last articles, for the better execution of the things in the aforesaid grant contained, it was further enacted, that whensoever the president of the college, or commonalty of the faculty of physic in London, for the time being, or such as the aforesaid president and college, yearly, according to the tenor and meaning of the same act, should authorise to search, examine, correct, and punish all offenders and transgressors in the aforesaid faculty, within the same city and precinct in the aforesaid act expressed, should send, or commit such offender or offenders, for his or their offences or disobedience, contrary to any article or clause contained in the aforesaid grant, or act, to any ward, gaol, or prison, within the aforesaid city and precinct aforesaid (the Tower of London excepted) that then, and from time to time, the warders, gaolers, and keepers of the wards, gaols, and prisons within the city or precinct aforesaid (the Tower of London excepted) should receive into his or their prisons all and every

The statute of
Mary confirm-
ing the same.

[* 109 b.]

And enlarging
their power.

[* 110 a.]

such person or persons so offending, which should be sent, or committed to him, or them, as aforesaid, and there safely should keep the person or persons so committed into any of their prisons, at the proper costs and charges of the person or persons so committed, without bail or mainprize, until such offender and offenders, by disobedients, be discharged of the aforesaid imprisonment, by the aforesaid president; and such persons as by the aforesaid college should be authorised, upon pain, that every such warden, gaoler, or keeper, doing *the contrary, should lose and forfeit double of such fine and amercement as such offender or offenders, or disobedients, should be assessed to pay, by such as by the said president and college, as should be authorised, as before is said, so as the said fine and amercement should not be at any time above the sum of 20*l.*, the moiety whereof to be employed to the use of the said late Queen, her heirs and successors, and the other moiety to the aforesaid president and college, all which forfeitures should be recovered by action of debt, bill, plaint, or information, in any the said late Queens, her heirs or successors, courts of record, against any such warden, gaoler, or keeper, so offending, in which no essoign, wager of law, nor protection, should be allowed, nor be admitted for the defendant: and further it was enacted, by the authority of the said parliament, that all justices, mayors, sheriffs, bailiffs, constables, and other ministers and officers within the city and precinct aforesaid, upon request to them to be made, should help, aid, and assist the president of the aforesaid college; and all persons, by them from time to time authorised, for the due execution of the said act, or statute, upon pain, for not giving help to them, of being in contempt of the said late Queen, her heirs or successors, as by the same act, amongst other things, more fully appeareth. And the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William, further say, that by virtue of the said letters patent, and by force of the statutes aforesaid, one Thomas Langton, doctor of physic, a man prudent and skilful in the faculty of physic, and then one of the commonalty of the college of physicians, in London aforesaid; and then also being one of the eight electors of the college aforesaid, before the said time when, &c. that is to say, the 30th day of September, in the year 1605, at the college of physicians, situate in London, in the parish of St. Bennet, Paul's-wharf, in the ward of Baynard's-castle, was duly chosen and preferred to the office of president of the college aforesaid, and then and there held the said office of president of the college aforesaid: and the said Thomas Langton being president of the college aforesaid, the same president and commonalty of the college aforesaid, the same 30th day of September, in the year 1605, abovesaid, at the college aforesaid, did choose Ralph Wilkinson, William Dun, Richard Palmer, and John Argent, prudent men, and skilful in the faculty of physic; and then being four doctors of the college aforesaid, to be the four censors or governors of the commonalty aforesaid, to oversee, search, correct, and govern all and singular physicians of the said city,

That T. L. was preferred to, and held the office of president of the said college.

The said T. L. president and the commonalty of the said college chose R. W., W. D., R. P., and I. A., to be the four censors of the said commonalty.

using the faculty of physic in the said city, and other foreign physicians whomsoever, *frequenting to, and using the said faculty of physic, any ways within the said city, and the suburbs thereof, or within seven miles in circuit of the same city, and to punish their defects in not well exercising, doing, and using the same; as also to oversee, and search all manner of medicines, and their receipts, by the said physicians, or any of them, for curing of infirmities, as often as need should be; and to punish the said physicians, delinquents, exercising the said faculty of physic, by fines, amercements, and imprisonment of their bodies, and other ways reasonable and fitting, according to the form and effect of the said letters patent, and the statutes aforesaid: and the said Thomas Langton being president of the college aforesaid, and the aforesaid Ralph Wilkinson, William Dun, Richard Palmer, and John Argent, being likewise the four censors or governors of the college aforesaid, the aforesaid Thomas Bonham, within the aforesaid time in which, &c. that is to say, the 10th day of April, in the year of our Lord 1606, within London aforesaid, in the aforesaid parish of the blessed Lady of Bows, in the ward of Cheap aforesaid, contrary to the form and effects of the letters patent aforesaid, and the aforesaid statute made in the parliament aforesaid, of the said King Henry the Eighth, did practise physic, not admitted by the letters of the aforesaid president and college, sealed with their common seal; whereas in truth the aforesaid Thomas Bonham was insufficient to practise physic; by reason whereof, the said Thomas Bonham afterwards, that is to say, the 13th day of April, in the year of our Lord 1606, at London, in the parish and ward aforesaid, was summoned by the aforesaid censors or governors of the college aforesaid, to appear before the president and censors, or governors of the college aforesaid, at the college aforesaid, in the parish and ward aforesaid, the 14th day of April, in the year of our Lord 1606, abovesaid, then next following, to be examined upon the premises: at which 14th day of April, in the year of our Lord 1606, aforesaid, at the college aforesaid, came the aforesaid Thomas Bonham, in his proper person, before the aforesaid president and censors, or governors of the said college, and then there was examined of his science in his faculty of physic to be administered, by the aforesaid censors or governors of the college aforesaid; and because the said Thomas Bonham so examined answered less aptly and insufficiently in the art of physic, he then and there upon his examination aforesaid was found by the aforesaid president and censors, or governors of the college aforesaid, less sufficient and unskilful to administer physic; and for that the aforesaid Thomas Bonham being many times examined, and forbidden by the president and censors, or governors aforesaid, for the causes aforesaid, to administer *physic for a month, or more, after such forbidding of him within London aforesaid, in the aforesaid parish of the blessed Mary of Bows, in the ward aforesaid, without the licence of the aforesaid president and college, under their common seal,

[*110 b.]

The plaintiff, contrary to the letters patent, &c. practised physic, not having been admitted by the letters of the said president and college, sealed with their common seal; whereas the said plaintiff was insufficient to practise physic.

Wherefore he was summoned to appear before the said president and censors.

Plaintiff appeared, and was examined, and found insufficient to practise physic.

And for that he being forbidden to administer physic; for a

[* 111 a.] month or more after such forbidding, without the licence

of the said president and college, &c. did practise.

He was amerced 100s. and enjoined from practising physic within London, and seven miles circuit of the said city, until he was found sufficient, and should be admitted; under pain of imprisonment.

The said T. L. was elected to, and held the office of president of the college for one year next following.

The said president and commonalty chose G. T., T. M., W. D., and I. A., four of the defendants, to be the four censors of the said college.

contrary to the form of the letters patent aforesaid, and the statutes aforesaid did practise, then and there it was granted, by the aforesaid president and censors, or governors of the college aforesaid, that the aforesaid Thomas, for his said disobedience and contempt, be amerced to 100s. in the next assembly of the aforesaid president and college, at the college aforesaid to be paid: and then and there it was commanded to the said Thomas Bonham, by them the president and censors, or governors of the college aforesaid, that the aforesaid Thomas Bonham, from thenceforth, should forbear to practise physic within the aforesaid city of London, and the suburbs thereof, and seven miles circuit of the said city, until the said Thomas Bonham were found to be sufficient, and should be admitted to practise the said art of physic, within the city and circuit aforesaid, by the president and college aforesaid, under the pain of being cast into prison, if in the premises, as is aforesaid, he should offend.

And the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, further say, that after and before the aforesaid time when, &c. that is to say, the first day of October, in the year of our Lord 1606, abovesaid, at the college aforesaid, at London aforesaid, in the parish and ward aforesaid, the aforesaid Thomas Langton, doctor of physic; a man prudent and skilful in the faculty of physic, and then one of the commonalty of the college of physicians in London aforesaid, and one of the electors of the college aforesaid, was elected and chosen into the office of president of the college aforesaid, for one year then next following, and the office of president of the college aforesaid, then and there held: and the said Thomas Langton being president of the college aforesaid, the same president and commonalty of the college aforesaid, the said first day of October, in the year of our Lord 1606, abovesaid, at the college aforesaid, chose the aforesaid George Turner, Thomas Moundford, William Dun, and John Argent, doctors, men prudent and skilful in the faculty of physic, and then being four of the college aforesaid, to be the four censors or governors of the said college, to supervise, search, correct, and govern, all and singular the physicians of the said city, and other foreign physicians whomsoever, frequenting to, and exercising the said faculty of physic within the same city, and the suburbs of the same city, or within seven miles circuit of the said city, and to punish their defects, in not well exercising, doing and using the same; as also to oversee, and search all manner of medicines and receipts by the said physicians, exercising the said faculty of physic within the city of London aforesaid, and the circuit aforesaid, or any of them, for the curing of diseases, as often as need should be required, and to punish the said physicians exercising the faculty of physic in the premises, delinquents, by fines, ameracements, and imprisonments of their bodies, and other ways reasonable and fitting, according to the form and effect of the letters patent aforesaid, and the statutes aforesaid: and the said Thomas Langton being president of the college aforesaid, and the

[* 111 b.]

aforesaid George Turner, Thomas Moundford, William Dun, and John Argent, being likewise the four censors, or governors of the college aforesaid, the said Thomas Bonham, before the time when, &c. that is to say, the 20th day of October, in year of our Lord 1606, abovesaid, within London aforesaid, that is to say, in the aforesaid parish of the blessed Mary of Bows, in the ward of Cheap aforesaid, did practise physic, contrary to the form of the aforesaid letters patent, and the statutes aforesaid, and the aforesaid forbidding and command of the aforesaid president and censors: and afterwards, that is to say, the same 20th day of October, in the year of our Lord 1606, aforesaid, the said Thomas Bonham, at London aforesaid, in the aforesaid parish of the blessed Mary of Bows, in the ward of Cheap aforesaid, was summoned by the aforesaid censors, or governors of the college aforesaid, to appear before the said censors, at the college aforesaid, in the parish and ward aforesaid, the 22d day of the said month of October, upon the premises to be examined, at which 22d day of October, in the year of our Lord 1606, abovesaid, at the assembly of the college aforesaid, holden at the college aforesaid, at London aforesaid, in the parish and ward aforesaid; afterwards, that is to say, the same 22d day of October, in the year of our Lord 1606, abovesaid, before the said George Turner, William Dun, Thomas Moundford, and John Argent, then censors and governors of the college aforesaid, because that the said Thomas Bonham, by the aforesaid censors or governors of the college aforesaid, as it is said, being warned to appear at the college aforesaid, before the president and censors, or governors of the college aforesaid, the aforesaid 22d day of October, in the same day, did not appear, then and there it was considered by the said censors or governors of the college aforesaid, that the said Thomas Bonham, for his disobedience and contempts, should be amerced to 10*l.*, and that the said Thomas Bonham, for the causes aforesaid, should be arrested, and delivered into custody, and the said Henry, George, Thomas Moundford, John Argent, John Taylor, and William (Bowden,) farther *say, that afterwards, and before the time when, &c. that is to say, the 24th day of October, in the year of our Lord 1606, abovesaid, the said Thomas Langton, president of the college aforesaid, at London, in the aforesaid parish of the blessed Mary of Bows, in the ward of Cheap aforesaid, died; after whose death, and before the time when, &c. that is to say, the 25th day of October, in the year of our Lord 1606, abovesaid, the said Henry Atkins, a prudent man, and skilful in the faculty of physic, and one of the commonalty of the college aforesaid, and one of the then eight electors of the college aforesaid then being, at the college aforesaid, within London aforesaid, in the parish and ward aforesaid, was in due manner chosen, and into the office of president of the college aforesaid, for one whole year then next following, and then and there held, and as yet doth hold the said office of president of the college aforesaid; and the said Henry Atkins being president of the college aforesaid, and the

the said president and censors, and refused to yield obedience to the president and censors.

The plaintiff did practise physic contrary to the said letters patent, &c. and the forbidding of the aforesaid president and censors.

Afterwards the plaintiff was summoned to appear before the said censors.

The said G. T., W. D., T. M., and I. A., because the plaintiff being warned did not appear, amerced him to 10*l.*, and ordered him to be arrested and delivered into custody.

[* 112 a.]
T. L. died.

H. A. elected to be president of the college for one year next following, and held, and still holds, the said office.

Plaintiff appeared before

aforesaid George Turner, William Dun, Thomas Moundford, and John Argent, being censors or governors of the college aforesaid, at an assembly of the college aforesaid holden, at the college aforesaid, within London aforesaid, in the parish and ward aforesaid, the 7th day of November, in the year of our Lord 1606, abovesaid, before the aforesaid Henry Atkins, then president of the college aforesaid, and the aforesaid George Turner, William Dun, Thomas Moundford, and John Argent, then censors or governors of the college aforesaid, came the aforesaid Thomas Bonham in his proper person, of which Thomas Bonham, when the aforesaid Henry Atkins, then president of the college, and the aforesaid George Turner, William Dun, Thomas Moundford, and John Argent, then censors or governors of the college aforesaid, asked whether he would satisfy to the college aforesaid, for his disobedience and contempts aforesaid, and again submit himself to be examined, and to obey the judgment of the college aforesaid; and the aforesaid Thomas Bonham then and there answered, that he, before that had within London aforesaid, done and practised, and then after within London aforesaid, would do and practise physic, no leave being asked of the said college, and that he would not, in any thing, to the president and censors, or governors of the college aforesaid, yield obedience; and then and there affirming the aforesaid president and censors, or governors aforesaid, to have no authority over those who are made doctors in the university; by which the said censors or governors, for the offences and disobedience aforesaid, then and there ordained and decreed, that the aforesaid Thomas Bonham should be sent to prison, there to remain, until from thence, by the president and *censors, or governors of the college aforesaid, for the time being he should be delivered, as by the said letters patent, and the statutes aforesaid, it is ordained and established; and then and there made their warrant, with the common seal of the said college or commonalty sealed, and to the keeper of the prison of the lord the King, in the Compter, London, in the Poultry, in the parish of St. Mildred, in the ward of Cheap directed, and commanded by the said warrant to the keeper of the prison aforesaid, that the said keeper of the prison aforesaid should receive the body of the said Thomas Bonham, and him, in the prison aforesaid, of the said lord the King, there should safely keep, without bail or mainprize, at the proper costs and charges of the aforesaid Thomas Bonham, until the aforesaid Thomas Bonham, by the command of the president and censors, or governors aforesaid, or their successors, he should be delivered; which Thomas Bonham, for his offences and disobedience aforesaid, together with the warrant aforesaid, in form aforesaid made, the said Henry Atkins then being president of the college aforesaid, and the aforesaid George Turner, William Dun, Thomas Moundford, and John Argent, then being the four censors or governors of the college aforesaid, by virtue of the letters patent, and statutes aforesaid, and the aforesaid William Bowden and John Taylor as servants of the said Henry

Wherefore the censors ordered that the plaintiff should be sent to prison.

[* 112 b.]

And made their warrant to the keeper of the Compter to receive the plaintiff, and keep him in prison.

And the said H. A., the said president, G.T., W. D., T. M., and I. A., the said censors, and W. B., and I. T., as their servants delivered the plaintiff and the warrant to the keeper of the Compter, &c.

Atkins, president, and of George, William Dun, Thomas Moundford, and John Argent, and by their the said president, and four censors or governors aforesaid, warrant, the aforesaid time, when, &c. to one Richard Ware, then keeper of the said prison of the lord the King, of the Compter aforesaid at London, in the parish of St. Mildred the virgin, in the Poultry, in the ward of Cheap aforesaid, did commit and deliver into safe custody, according to the form and effect of the letters patent, and statutes aforesaid, as to them it was lawful to do; which commitment of the aforesaid Thomas Bonham, for the causes aforesaid, in form aforesaid done, is the same trespass and imprisonment whereof the aforesaid Thomas Bonham above complaineth: and this they are ready to verify, and thereupon pray judgment, if the said Thomas Bonham, his action aforesaid against them ought to have, &c.

And the aforesaid Thomas Bonham saith, that he, for any thing before, &c. alleged to have his action, ought not to be barred, because protesting that he the said Thomas Bonham, was not insufficient, nor was found by the aforesaid president and censors, or governors of the college aforesaid, to practise physic, nor unfitly or insufficiently to the aforesaid president and censors, or governors of the college aforesaid, in the art of physic did answer, as the said H. Atkins, G. Turner, T. Moundford, *John Argent, John Taylor, and William Bowden, above have alleged for plea, the said Thomas Bonham saith, that by the aforesaid act in the aforesaid Parliament, of the aforesaid late King Henry VIII. holden at London aforesaid, the aforesaid 5th day of April, in the 14th year of his reign, and from thence adjourned to Westminster, in the aforesaid county of Middlesex, until the last day of July, in the 15th year of the reign of the said King, and then and there holden, it was further enacted by authority of the same Parliament, that whereas in the dioceses of England, out of London, it was not then very likely always to find men able sufficiently to examine according to the statute such as should be admitted to exercise physic in them, that no person then after be suffered to exercise physic through England, until the said person should be examined at London, by the aforesaid president, and three of the aforesaid electors and should have from the said president and electors, letters testimonial of their approbation and examination, except he should be a graduate of Oxford or Cambridge, who had accomplished all things for his form without any grace. And further, the said Thomas Bonham saith, that he the said Thomas, the second day of July, in the year of our Lord 1595, in the University of Cambridge aforesaid took the degree and dignity of a doctor in physic; and then and there, that is to say, the said second day of July, in the year of our Lord 1595 abovesaid, in the University aforesaid, at Cambridge aforesaid, in the county of Cambridge, was duly and lawfully ordained and made a graduate of the University aforesaid, that is to say, doctor in physic, according to the laws, statute, constitutions, and ordinances of the said University of Cambridge aforesaid, and that he the said

Replication. Plaintiff protesting that he was not insufficient to practise physic, saith by the said act H. 8. no person should practise [* 113 a.] tise, &c. until he was examined, &c. except a graduate of Oxford or Cambridge.

Plaintiff took the degree of M. D. in the University of Cambridge.

And practised
physic in the
city of London,
as it was law-
ful for him to
do, &c.

[* 113 b.]

Demurrer.

Joinder in de-
murrer.

*Curia advisare
vult.*

Thomas Bonham then and there had accomplished all things concerning his degree aforesaid, by his form, without grace, from time to time, according to the laws, statutes, constitutions, and ordinances of the said University of Cambridge aforesaid: by colour whereof the said Thomas Bonham, a graduate of the University of Cambridge aforesaid, that is to say, being doctor in physic in the form aforesaid, who had accomplished all things concerning his degree aforesaid, for his form, without any grace, the said faculty of physic from time to time in the said city of London, that is to say, in the aforesaid parish of the Blessed Mary of Bow, in the ward of Cheap aforesaid, did exercise, as it was lawful for him to do, until the aforesaid Henry Atkins, George Turner, Thomas Moundford, John Argent, John Taylor, and William Bowden, together with, &c. the aforesaid 10th day of November, in the fourth year abovesaid, with force and arms, him the said Thomas Bonham, at London aforesaid, in the aforesaid parish of the Blessed Mary of Bow, in the ward of Cheap, took and imprisoned, and *him there in prison long, that is to say, by the space of seven days, against the law and custom of this kingdom of England, did detain, as the aforesaid Thomas Bonham above against them complaineth, and this he is ready to verify: whereupon, inasmuch as the aforesaid Henry Atkins, George Turner, Thomas Moundford, John Argent, John Taylor, and William Bowden, the trespass and imprisonment aforesaid, above have acknowledged, the said Thomas Bonham prays judgment, and his damages, by reason of the trespass and imprisonment aforesaid, to be adjudged unto him, &c. And the aforesaid Henry Atkins, George Turner, Thomas Moundford, John Argent, John Taylor, and William Bowden say, that the aforesaid plea of the aforesaid Thomas Bonham, above by replication pleaded, is not sufficient in law, for him the said Thomas Bonham to maintain his said action, against them the said Henry Atkins, George Turner, Thomas Moundford, John Argent, John Taylor, and William Bowden, and that they to that plea in manner and form aforesaid by replication pleaded, need not, nor by the law of the land are bound to answer, and this they are ready to verify, whereupon they pray judgment, And that the said Thomas Bonham may be barred from having his action aforesaid against them, &c. And the aforesaid Thomas Bonham, forasmuch as he sufficient matter in law, to maintain his action aforesaid, against the said Henry Atkins, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, above hath alleged, which he is ready to verify, which matter the aforesaid Henry, George, Thomas Moundford, John Argent, John Taylor, and William Bowden, do not deny, nor to the same any ways answer, but the same averment altogether to admit do refuse, as before prays judgment and his damages, by occasion of the trespass and imprisonment aforesaid to be adjudged, to him, &c. And because the justices here will advise themselves of and upon the premises aforesaid, whereof the parties have put themselves upon the judgment of the Court

aforesaid, before that they give their judgment thereof, day is given to the parties here, until in eight days of St. Hilary, to hear their judgment thereof, because the same Justices here thereof are not yet, &c.

DR. BONHAM'S CASE,

[114 a.]

Hil. 7 Jac. 1.

In an action for false imprisonment, brought against the president and censors of the College of Physicians and others, the defendants justified under the charter for the incorporation of the College, and the stat. 14 and 15 Hen. 8. cap. 5. by which the charter is confirmed, and the stat. 1 Mary. cap. 9. enlarging the power of the censors, and set forth that the plaintiff practised physic not being admitted, &c.: that being examined, he was found insufficient, and forbidden to practise: but, notwithstanding such prohibition, he afterwards practised for a month or more, whereupon they amerced him 5*l.* to be paid to them at their next assembly, &c. and likewise enjoined him to forbear practising any more until he be found sufficient, &c. under pain of imprisonment: that he, continuing still to practise, was further fined and ordered to be committed: that being questioned, if he would submit to the said College? he replied, that he had practised and would practise without leave of the College; and denied that by the statute they had any authority over him, he having taken his degree of Doctor of Physic, within the University, regularly; whereupon the censors ordered him to prison, which was executed accordingly. The plaintiff in his replication shewed the clause in the act upon which he relied, and averred that he had taken the degree of Doctor of Physic in the University of Cambridge, and practised physic in the City of London as he well might: upon demurrer to this replication judgment was given for the plaintiff.

BONHAM
v.
ATKINS
and Others.
P.VIII.—114 a.

Resolved,—1. The censors had no power to commit the plaintiff for any of the causes mentioned in the bar. Because the said clause which gives power to the said censors to fine and imprison does not extend to the clause, "That none in the said city, &c. exercise the said faculty, &c." which clause prohibits every one from practising in London, &c. without licence of the president and College, but extends only to punish those who practise in London, *pro delictis suis in non bene exequendo, faciendo, et utendo facultate medicinæ*, so that their power is limited to the ill and not to the good use and practice. 2. Admitting the censors had power, yet they have not pursued it;—1. Because the censors alone have power to fine and imprison whereas here the pre-

sident and censors imposed this fine of 5*l*. 2. The plaintiff was summoned to appear before the president and censors, and for not appearing was fined 5*l*., whereas the president had no authority. 3. The fines imposed by them by virtue of this act belong to the King and not to them, and yet the fine is limited to be paid to themselves, &c. and for nonpayment they have imprisoned him. 4. They ought to have committed the plaintiff immediately, although no time be limited in the act. 5. Their proceedings ought not to be by parol inasmuch as their authority is by patent and act of parliament, and especially it being to fine and imprison. 6. The act giving a power to imprison until he be delivered by the president and censors, or their successors, shall be taken strictly, or otherwise the liberty of the subject is at their pleasure.

*1. None can be punished for practising physic within London, but by forfeiture of 5*l*. a month, which is to be recovered by the law. 2. If any practise physic there for less time than a month, he shall forfeit nothing. 3. If any person prohibited by the statute offend *in non bene exequendo*, &c. they may punish him according to the statute within the month. 4. Those whom they commit to prison by the statute ought to be committed immediately. 5. The fines which they assess according to the statute belong to the King. 6. They cannot impose fine or imprisonment without making a record thereof. 7. The cause for which they impose a fine and imprisonment ought to be certain; for it is traversable.* S. C. 1 Brown. 255.

[* 114 a.]

Carth. 192.
6 Mod. 125.
Skinner 568.
4 Inst. 251.
2 Brown. 255,
256, &c. 1 Ld.
Raym. 454.
Com. Dig. Phy.
A. Vin. Ab.
Phys. A. 4
Burr. 2168.

* THOMAS BONHAM, doctor in philosophy and physic, brought an action of false imprisonment against Henry Atkins, George Turner, Thomas Moundford, and John Argent, doctors in physic, and John Taylor, and William Bowden, yeomen; for that the defendants, the 10th November *anno* 4 Jacobi, did imprison him, and detain him in prison seven days. The defendants pleaded the letters patent of King H. 8. bearing date 23 September *anno* 10 of his reign, by which he recites, *Quod cum Regii officii sui munus arbitrabatur ditionis sue hominum felicitati omni ratione consulere, id autem vel imprimis fore si improborum conatibus tempestive occurreret*, &c. And by the same letters patent, the King granted to John Chamber, Thomas Linacre, Ferdinando de Victoria, John Halswel, John Frances, and Robert Yaxley, *quod ipsi omnesque homines ejusdem facultatis de et in civitat' London sint in re et nomine unum corpus et communitas perpetua, per nomen præsidentis et collegii, sive communitatis facultatis medicinæ London*, &c. And that they might make meetings and ordinances, &c. But the case at bar doth principally consist on two clauses in the charter. The first, *concessimus etiam eisdem præsidenti et collegio seu communitati et successoribus suis, quod nemo in dicta civitate, aut per septem milliaria in circuitu ejusdem, exerceat dictam facultatem medicinæ, nisi ad hoc per dict' præsident' et communit' seu successores suos, qui tempore fuerint, admissus sit per ejusdem præsidentis et collegii literas sigillo suo communi sigillat' sub pœna centum * solidorum pro quolibet mense quo non admissus eandem facultatem exercuerit, dimid'*

[* 114 b.]

inde dom' Regi et hæredibus suis, et dimidium dict' præsidenti et collegio applicand', &c. The second clause is, which immediately follows in these words, *præterea voluit et concessit pro se et successoribus suis, quantum in se fuit, quod per præsident' collegium prædict' communitat' pro tempore exist' et eorum successores imperpetuum, quatuor singulis annis per ipsos eligerent qui haberent supervisum et scrutinium, correctionem et gubernationem omnium et singulorum dict' civitatis medicorum, utentium facultat' medicinæ in eadem civitate, ac aliorum medicorum forinsecorum quorumcunque facultatem illam medicinæ, aliquo modo frequentantium et utentium infra eandem civitatem et suburbia ejusdem, sive infra septem milliaria in circuitu ejusdem civitatis, ac punitionem eorundem pro delictis suis in non bene exequend' fuciend' et uten' illa: necnon supervisum et scrutinium omnium medicinarum, et earum receptionem per dictos medicos seu aliquem eorum hujusmodi ligcis dicti nuper Regis pro eorum infirmitatibus curand' et sanand' dand' imponend, et utend' quoties et quando opus fuerit, pro commodo et utilitat' eorundem ligeorum dicti nuper Regis: ita quod punitio eorundem medicorum utentium dicta facultate medicinæ sic in præmiss' delinquentium per fines, amerciamenta et imprisonment' corporum suorum, et per alias vias rationabiles et congruas exqueretur, prout by the said charter plenius liquet. Et quod virtute præd' literarum patentium præd' J. Chambre, Tho. Linacre, &c. et omnes homines ejusdem facultatis in civit' præd' fuer' unum corpus et communitas perpet' sive collegium perpetuum.* And afterwards by act of parliament made anno (a) 14 Hen. 8., it was enacted that the said corporation, and every grant, article, and other things in the said letters patent contained and specified, should be approved, granted, ratified, and confirmed, &c. *in tam amplo et largo modo prout poterit acceptari, cogitari, et construi per eandem literas patentes.* And further it was enacted that the said six persons named in the said letters patent, as principal of the said college, should be elect to them two others of the said college, who should be named *electi*, and that the said elects should choose one of them to be president as by the said act appears: and further they pleaded the act of (b) 1 Mariæ, by which it is enacted, *Quod quædam concessio per literas patentes de incorporatione facta per prædict' nuper Regem medicis London. Et omnes clausulæ et articuli content' in eadem concessione approbarentur, concederentur, ratificarentur et confirm' per prædict' Parl'; in consideratione cujus inactitat' fuit autoritate ejusdem Parliamenti. Quod præd' statut' et actum Parliamenti in omnibus articulis et clausulis in eodem content' extunc imposterum starent et continuarent in pleno robore, &c.* And further it was enacted, "That whensoever the president of the college, or com-
monalty of the faculty of physic at London for the time being,
"or such as the said president and college shall yearly, ac-
cording to the tenor and meaning of the said act, authorize
"to search, examine, correct, and punish all offenders and
"transgressors in the said faculty, &c. shall send or commit
"any such offender or offenders for his or their offence or dis-

(a) 14 & 15 H.
8. c. 5. 1 Roll.
598. 4 Inst.
241. Rastal's
Physicians 3.
2 Bulst. 185.
Lit. Rep. 168,
169, 172, 212,
215, 246, 247,
248, 249. 1
Jones 261. Cr.
Jac. 121, 159.
160. Cr. Car.
256. Palm. 486.
(b) 1 Mar. c. 9.
Rastal's Physic.
7. Lit. R. 169.
172, 173, 212,
213, 215, 248,
249, 350, 351.
1 Jones 263.
Cr. Car. 257.
Cr. Jac. 121.
4 Inst. 251.
2 Brown. 257,
262, 265, 266.
[* 115 a.]

“obedience, contrary to any article or clause contained in the said grant or act, to any ward, gaol, or prison within the same city (the Tower of London except) that then from time to time the warden, gaoler, or keeper, &c. shall receive, &c. such person so offending, &c. and the same shall keep at his proper charge, without bail or mainprize, until such time as such offender or disobedient be discharged of the said imprisonment by the said president, and such persons as shall be thereunto authorised, upon pain that all and every such warden, gaoler, &c. doing the contrary, shall lose and forfeit the double of such fines and amerciaments as such offender and offenders shall be assessed to pay, by such as the said president and college shall authorise as aforesaid, so that the fine and amerciamment be not at any one time above the sum of 20*l.*, the one moiety to the King, the other moiety to the president and college, &c.” And further pleaded, that the said Thomas Bonham, April 10, 1606, within London, against the form of the said letters patent, and the said acts, *exercebat artem medicinæ, non admissus per literas præd' præsentis et collegii sigillo eorum communi sigillat' ubi revera præd' Tho. Bonham fuit minus sufficiens ad artem medicinæ exercend'.* By force of which, the said Thomas Bonham, 30 Aprilis 1606, was summoned in London by the censors or governors of the college, *ad comparand' coram præsiden' et censor' sive gubernatorib' collegii præd' at the college, &c. the 14th day of April next following, super præmissis examinand'.* At which day the said Thomas Bonham came before the president and censors, and was examined by the censors *de scientia sua in facultate sua in medicin' administrand'.* Et quia præd' Thomas Bonham sic examinatus minus apte et insufficiens in præd' arte medicinæ respondebat, et inventus fuit super examinationem præd' per præd' præsiden' et censores minus insufficiens et inexpert' ad artem medicinæ administrand' ac pro eo quod præd' Thomas Bonham multoties ante tunc examinatus, et interdictus per præsiden' et censores, de causis præd' ad artem medicinæ administrand' per unum mensem et amplius post talem interdictionem facultatem illam in Lond' præd' sine licentia, &c. ideo ad tunc et ibid' consideratum fuit per præd' præsiden' et censores, quod præd' Thomas Bonham pro inobedientia et contempt' suis præd' amerciaretur to 100*s.* in proximis comitiis præd' præsiden' et collegii persolvend' et deinceps abstineret, &c. quousque inventus fuerit sufficiens, &c. sub pœna *conjiendi in carcerem si in præmissis delinqueret. And that the said Thomas Bonham, 20 Oct. 1636, within London did practise physic, and the same day he was summoned by the censors to appear before the president and them, 22 October then next following, at which day Bonham made default: ideo consideratum fuit per præd' censores, that for his disobedience and contempt he should be amerced to 10*l.* and that he should be arrested and committed to custody; and afterward, November 7, 1606, the said Thomas Bonham, at their assembly came before the president and censors, and they asked him if he would satisfy the college for his disobedience and contempt, and submit himself to be examined, and

[*115 b]

obey the censure of the college, who answered, that he had practised and would practise physic within London, *nulla a collegio petita venia*, and that he would not submit himself to the president and censors; and affirmed, that the president and censors, had no authority over those who were doctors in the university; for which cause, the said four censors, *sc.* Dr. Turner, Dr. Moundford, Dr. Argent, and Dr. Dun, then being censors or governors, *pro offensis et inobedientia præd' adtunc et ib' ordinauerunt et decreuerunt, quod præd' Thomas Bonham in carcerem mandaretur ib' remansur' quousque abinde per præsiden' et censors, seu gubernatores collegii præd' pro tempore existen' deliberaretur*, and there then by their warrant in writing, under their common seal, did commit the plaintiff to the prison of the Compter of London, &c. *absque ballio sive manu-capt' ad custagia et onera ipsius Thomas Bonham, donec præd' Thomas Bonham per præcept' præsiden' et censor' collegii præd' sive successor' suor' liberatus esset*; and Dr. Atkins then president, and the censors, and Bowden and Taylor as their servants, and by the commandment of the said president and censors, did carry the plaintiff with the warrant, to the gaol, &c. which is the same imprisonment. The plaintiff replied and said, that by the said act of 14 H. 8. it was further enacted, "And where that in the dioceses of England, out of London, it is not like to find always men able sufficiently to examine (after the statute) such as shall be admitted to exercise physic in them, that it may be enacted in this present parliament, that no person from henceforth be suffered to exercise or practise physic through England, until such time that he be examined at London by the said president and three of the said elects, and to have from them letters testimonial of their approving and examination, except he be a graduate of Oxford or Cambridge, which have accomplished all things for his form without any grace:" and that the plaintiff, *anno Dom. 1595*, was a graduate, *sc.* a doctor in the university of Cambridge, and had accomplished all things concerning his degree for his form without (a) grace, by force whereof he had exercised and practised physic within the city of London until the defendants had imprisoned him, &c. upon which the defendant demurred in law. And this case was often *argued by the Serjeants at bar in divers several terms; and now this term the case was argued by the Justices, and the effect of their arguments who argued against the plaintiff (which was divided into three parts) shall be first reported. The first was, whether a doctor of physic of the one university or the other be by the letters patent, and by the body of the act of 14 H. 8. restrained from practising physic within the city of London, &c. The second was, if the exception in the said act of (b) 14 H. 8. has excepted him or not. The third was, that his imprisonment was lawful for his said disobedience. And as to the first, they relied upon the letter of the grant, ratified by the said act of 14 H. 8. which is in the negative, *sc. nemo in dicta civitate, &c. exerceat dictam facultatem nisi ad hoc per prædict' præsiden-tem et communitatem, &c. admissus sit, &c.* And this pro-

(a) 2 Browl.
201, 202.

[* 116 a.]

Arguments for
the defendants.

(b) 14 & 15 H.
8. cap. 5.

(a) 11 Co. 59 a
Co. Lit. 36 a.
2 Inst. 81.
Hard. 305.

(b) Rastal. Phys-
sician 1.

(c) 14 & 15 H.
8. c. 5. 1 Roll.
598. 4 Inst. 251.
Rastal. Phys-
sician 3.
2 Bulstr. 185.
Lit. Rep. 168,
169, 172, 212,
215, 246, 247,
248, 249.
1 Jones 261.
Cr. Jac. 121,
159, 160.
Cr. Car. 256.
Palmer. 486.
Cart. 115.

6 Mod. 125.

(d) 1 Mar. c. 9.

Rastal. Phys-
sician 7.

Lit. Rep. 119,
172, 173, 212,
[* 116 b.]

213, 215, 248,

249, 350, 351.

1 Jones 263.

Cr. Car. 257.

Cr. Jac. 121.

4 Inst. 251.

2 Brownl. 257,

262, 265, 266.

Cart. 115.

Whether a
doctor of phy-
sic of one of the
universities is
within the body
of the act; and
if he is, whe-
ther he is ex-
cepted by the
latter clause.

position is a general negative, and (a) *generale dictum est generale intelligendum*; and *nemo* excludes all; and, therefore, a doctor of the one university or the other is prohibited within this negative word *nemo*. And many cases were put where negative statutes shall be taken *stricte et exclusive*, which I do not think necessary to be recited here. Also they said, that the statute of (b) 3 H. 8. c. 11. which in effect is repealed by this act of (c) 14 H. 8. has a special proviso for the universities of Cambridge and Oxford, which being here left out, doth declare the intention of the makers of the act, that they did intend to include them within this general prohibition, *nemo in dicta civitate, &c.* As to the second point they strongly held, that the said latter clause, "and where that in the dioceses of Eng-
" land, out of London," &c. this clause, according to the words, extends only to places out of London, and so much the rather, because they provided for London before, *nemo in dicta civitate, &c.* Also the makers of the act put a distinction betwixt those who shall be licensed to practise physic in London, &c. for they ought to have the admittance and allowance of the president and college in writing, under their common seal: but he who shall be allowed to practise physic throughout Eng-
land, out of London, ought to be examined and admitted by the president and three of the elects; and so they said, that it was lately adjudged in the King's Bench, in an information exhibited against the said Dr. Bonham for practising physic in London for divers months. As to the third point they said, that for his contempt and disobedience before them at their assembly in their college, they might well commit him to prison; for they have authority by the letters patent and act of parliament, and therefore for a contempt or misdemeanor before them, they may commit him. Also the act of (d) 1 M. has given them power to commit them for every offence or disobedience contrary to any article or clause contained in the said grant or act. But there is an express negative article in the said grant, and ratified by the act of 14 H. 8. **quod nemo in dicta civitate, &c. exerceat, &c.* and the defendants have pleaded, that the plaintiff had practised physic in London by the space of one month, &c. and therefore the act of 1 Mariae has authorised them to imprison him in this case; wherefore they concluded against the plaintiff. But it was argued by Coke Chief Justice, Warburton and Daniel Justices of the Common Pleas, to the contrary. And Daniel, Justice, conceived, that a doctor of physic, of the one university or the other, &c. was not within the body of the act, and if he was within the body of the act, that he was excepted by the said latter clause: but Warburton argued against him for both the points (A); and the Chief Justice did not speak to those two points, because he and Warburton and Daniel agreed, that this action was clearly maintainable for two other points, and therefore in this action the

(A) A graduate doctor of one of the universities cannot practise physic within London, or seven miles round, without licence

from the college of physicians. *College of Physicians v. Dr. West*, 10 Mod. 353. *College of Physicians v. Levett*, 1 Ld. Raym. 472.

Chief Justice omitted to speak to the said two points: but to two other points he and the said two other Justices, Warburton and Daniel, did speak, *sc.* 1. Whether the censors have power, for the causes alleged in their bar, to fine and imprison the plaintiff. 2. Admitting that they have power to do it, if they had pursued their power. But the Chief Justice, before he argued the points in law, because much was said in commendation of the doctors of physic of the college in London, and somewhat (as he conceived) in derogation of the dignity of the doctors of the universities, he first attributed much to the doctors of the said college in London, and confessed that nothing was spoke in their commendation which was not due to their merits: but yet that no comparison was to be made between that private college, and either of the universities of Cambridge and Oxford, no more than between the father and his children, or between the fountain and the small rivers which descend from it; the university is *alma mater*, from whose breasts those of that private college have sucked all their science and knowledge (which I acknowledge to be great and profound) but the law saith, *erubescit lex filios castigare parentes*: the university is the fountain, and that and the like private colleges are *tanquam rivuli*, which flow from the fountain, *et melius est petere fontes quam sectari rivulos*. Briefly, *Academicæ Cantabrigiæ et Oxoniæ sunt Athenæ nostræ nobilissimæ, regni soles, oculi et animæ regni, unde religio, humanitas, et doctrina in omnes regni partes uberrimè diffunduntur*: but it is true, *nunquam sufficiet copia laudatoris, quia nunquam deficiet materia laudis*; and, therefore, those universities exceed and excel all private colleges, *quantum inter viburna cupressus*. And it was observed that King Henry VIII. in his said letters patent and the King and the Parliament in the act of 14 H. 8. in making of a law concerning physicians, for the more safety and health of men, therein follow the order of a good physician (*Rex enim omn' artes censetur habere in scrinio pect' sui*) for, *medicina *est duplex, removens, et promovens; removens morbum, et promovens ad salutem*; and, therefore, five manner of persons (who more hurt the body of man than the disease itself, one of which said of one of their patients, *fugiens morbum incidit in medicum*) are to be removed:—1. *Improbi*. 2. *Avari, qui medicinam magis avaritiæ suæ causa quam ullius bonæ conscientiæ fiducia profitentur*. 3. *Malitiosi*. 4. *Temerarii*. 5. *Inscii*. And of the other part five manner of persons were to be promoted, as appears by the said act, *sc.* those who were: 1, profound; 2, sad; 3, discreet; 4, groundly learned; 5, profoundly studied. And it was well ordained, that the professors of physic should be profound, sad, discreet, &c. and not youths, who have no gravity and experience; for as one saith, *In juvene theologo conscientiæ detrimentum, in juvene legista bursa detrimentum, in juvene medico cœmilerii incrementum*. And it ought to be presumed, every doctor of any of the universities to be within the statutes, *sc.* to be profound, sad, discreet, groundly learned, and profoundly studied, for none can there be master of arts (who is a doctor of philosophy) under the study of seven

Eulogium on
the universities
by Coke, C. J.

[* 117 a.]

1. The censors had not power to commit the plaintiff for any of the causes in the bar.

The reasons thereof.

(a) Godb. 418.
2 Roll. Rep. 356.
Wing Max. 239.

(b) 2 Co. 55 a.
[* 117 b.]

3 Co. 59 b.
Godb. 324.
Co. Lit. 381.
5 Co. 99 a.

1st Reason.
(c) Wing. Max.
239.

(d) Wing. Max.
239.

years, and cannot be doctor in physick under seven years more in the study of physick; and that is the reason that the plaintiff is named in the declaration doctor of philosophy, and doctor of physick; *quia oportet medicum esse philosophum, ubi enim philosophus desinit, medicus incipit*. As to the two points upon which the Chief Justice, Warburton and Daniel, gave judgment. 1. It was resolved by them, that the said censors had not power to commit the plaintiff for any of the causes mentioned in the bar; and the cause and reason thereof shortly was, that the said clause, which gives power to the said censors to fine and imprison, doth not extend to the said clause, *sc. quod nemo in dicta civitate, &c. exerceat dictam facultatem, &c.* which prohibits every one from practising physick in London, &c. without licence from the president and college: but extends only to punish those who practise physick in London, *pro delictis suis in non bene exequendo, faciendo et utendo facultate medicinæ*, by fine and imprisonment (n): so that the censors have not power by the letters patent, and the act, to fine or imprison any for practising physick in London, but only *pro delictis suis in non bene exequendo, &c. sc.* for ill, and not good use and practice of physick. And that was made manifest by five reasons, which were called *viduæ rationes*, because they had their vigour and life from the letters patent, and the act itself; and the best (a) expositor of all letters patent, and acts of parliament, are the letters patent and the acts of parliament themselves, by construction, and conferring (b) all the parts of them *together (c), *optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum*; and (d) *injustum est nisi tota lege inspecta una aliqua ejus particula proposita judicare vel respondere*. The first reason was, that these two were two absolute, perfect, and distinct clauses, and as parallels, and therefore the one did not extend to the other; for the second begins, *præterea voluit et concessit, &c.* and the branch concerning fine and imprisonment is parcel of the second clause. 2. The first clause prohibiting the practice of physick, &c. comprehends four certainties:—1. Certainty of the thing prohibited, *sc.* practice of physick. 2. Certainty of the time, *sc.* practice for one month. 3. Certainty of penalty, *sc.* 5*l.* 4. Certainty in distribution, *sc.* one moiety to the King, and the other moiety to the college; and this penalty he who practises physick in London incurs, although he practises and uses physick well, and profitable for the body of man; and on this branch the information was exhibited in the King's Bench. But the clause to punish *delicta in non bene exequendo, &c.* on which branch the case at bar stands, is altogether uncertain, for the hurt which may come thereby may be little or great, *leve vel grave*, excessive or small, &c. and therefore the King and the makers of the act could not, for an offence so uncertain, impose a cer-

(n) *Mala praxis* in a physician, surgeon, or apothecary, is a great misdemeanor and offence at common law, whether it be for curiosity or experiment, or by neglect; be-

cause it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. *Dr. Groenvelt's case*, Ld. Raym. 213. S. C. 12 Mod. 119.

tainty of the fine, or time of imprisonment, but leave it to the censors to punish such offences, *secundum quantitatem delicti*, which is included in these words, *per fines, amerciamenta, imprisonamenta corporum suorum, et per alias vias rationabiles et congruas*. 2. The harm which accrues by *non bene exequendo*, &c. concerns the body of man; and, therefore, it is reasonable that the offender should be punished in his body, *sc.* by imprisonment: but he who practises physic in London in a good manner, although he doth it without licence, yet it is not any prejudice to the body of man. 3. He who practises physic in London doth not offend the statute by his practice, unless he practises it by the space of a month. But the clause of *non bene exequendo*, &c. doth not prescribe any certain time, but at what time soever he ministers physic *non bene*, &c. he shall be punished by the said second branch: and the law hath great reason in making this distinction, for divers nobles (a), gentlemen, and others, come upon divers occasions to London; and when they are here they become subject to diseases, and thereupon they send for their physicians in the country, who know their bodies, and the cause of their diseases; now it was never the meaning of the act to bar any one of his own physician; and when he is here he may practise and minister to another by two or three weeks, &c. without any forfeiture; for any one who practises physic *bene*, &c. in London (although he has not taken *any degree in any of the universities) shall forfeit nothing, unless he practises it by the space of a month; and that was the reason that the time of a month was put in the act. 4. The censors cannot be (b) judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia* (c) *aliquis non debet esse Judex in propriu causa, imo iniquum est aliquem suæ rei esse judicem*; and one cannot be judge and attorney for any of the parties, Dyer 3 E. 6. 65. 38 E. 3. 15. 8 H. 6. 19 b. 20 a. 21 E. 4. 47 a., &c. And it appears in our books, that in many cases, the common law will (d) controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void; and, therefore, in 8 E. 3. 30 a. b. Thomas Tregor's case on the statute of W. 2. c. 38. *et artic' super chartas*, c. 9. Herle (e) saith, some statutes are made against law and right, which those who made them perceiving, would not put them in execution (c): the stat. of W. 2. (f) c. 21. gives a writ of *Cessavit*

2d Reason.

3d Reason.

(a) Cart. 115.

[* 118 a.]

4th Reason.

(b) Co. Lit.

141 a.

Bridg. 11.

Dyer 220. pl. 14.

(c) Co. Lit.

141 a.

When an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will adjudge such act to be void.

Examples.

(d) 7 Co. 14 a.

Calvin's case.

(f) 2 Inst. 401, 402.

2 Brownl. 198, 265. Hard. 140.

(e) 8 E. 3. 30 b.

(f)

(c) Lord Ellesmere observes, (Observations on the Reports, p. 21.) "And for novelty in *Dr. Bonham's case*, the Chief Justice having no precedent for him, but many judgments against him, yet doth he strike in sunder the bars of government of the College of Physicians; and, without any paus-

ing on the matter, frustrate the patent of King Henry VIII., whereby the college was erected, and tramples upon the act of parliament, 14 & 15 H. 8. whereby that patent was confirmed, blowing them both away as vain, and of no value, and this in triumph of himself being accompanied

hæredi potenti super hæredem tenent' et super eos quibus alienatum fuerit hujusmodi tenementum: and yet it is adjudged in 33 E. 3. (a) *Cessavit* 42. where the case was, two coparceners lords, and tenant by fealty and certain rent, one coparcener had issue and died, the aunt and the niece shall not join in a *Cessavit*, because the heir (b) shall not have a *Cessavit* for the cesser in the time of his ancestor, F. N. B. 209. F. and therewith agrees Plow. Com. 110 a.; and the reason is, because in a *Cessavit* the tenant before judgment may render the arrearages and damages, &c. and retain his land, and that he cannot do when the heir brings a *Cessavit* for the cesser in the time of his ancestor, for the arrearages incurred in the life of the ancestor do not belong to the heir: and because it would be against common right and reason, the common law adjudges the said act of parliament as to that point void. The statute of (c) Car-

(a) 2 Brownl.
265. 2 Inst. 402.
F. N. B. 209 f.

(b) 2 Brownl.
265. Vet. N. B.
138 b. 2 Inst.
442. Com. Dig.
Parl. R. 27.

(c) 2 Inst. 580,
581, 582, &c.
Skinner 464.

"but with the opinion of one Judge only
"for the matter in law where three other
"Judges were against him, which case pos-
"sesseth a better room in the press than is
"deserved."

In Serjt. Hill's copy of the observations in Lincoln's Inn Library, there is the following manuscript observation on the strictures of Lord Ellesmere. "In page 117 of the Report of *Dr. Bonham's case*, in 8 Co. it appears that two of the other Judges agreed with Coke as to the two points of which they gave judgment. The second point is in 117 b. and the matter of law in support of it, which is condemned here, is in page 118, viz. that a statute against reason is void, and is supported by many authorities then, and by others before, and since in our Courts; and the antiquity of it is still more ancient. Just. Inst. Lib. Tit. 2. Text 1. *Dr. Bonham's case* is reported in 2 Brownl. 255 to 266; and in p. 260, it appears that the case was argued by all the Justices of C. B., and at two several days it was argued by Foster, Daniel, and Warburton, against the plaintiff, and the second day by Walsmley, J. and Coke, C. J.: but the argument of Foster, Daniel, and Warburton, are not reported by Brownlow; but he reports fully, 1st, the argument of Walsmley for the plaintiff, and afterwards that of Coke against him. And in page 265, the like reasons and authorities are given by Coke, for his opinion, as appears in his Reports; and then Brownlow mentions only at the end, that 'so he (Coke) concluded that judgment shall be entered for the plaintiff, which was done accordingly.' This last report is, I think, a confirmation of Lord Coke's report, though Lord Coke only reports the effect of the arguments of the Justices, who were of opinion against the plaintiff, fol. 116. There is, it is true, in some parts of the argument

"some things that savour of the pedantry
"and quaintness peculiar to the time, but
"nothing to impeach that part of it which
"is the part objected to by Lord Egerton;
"and, as above observed, Coke's opinion as
"to that part at least, is confirmed by many
"authorities before that case."

In the *City of London v. Wood*, 12 Mod. 669., debt was brought in the Mayor's Court, (a court holden before the mayor and aldermen) on a bye law, to recover a forfeiture for refusing to serve the office of sheriff, and such action was brought in the name of the mayor and commonalty, and it was held to be error; and per Holt, C. J., "What my Lord Coke says in *Bonham's case*, in his 8 Co., is far from any extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature: but it cannot make one who lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B.: but it may make the wife of A. to be the wife of B., and dissolve her marriage with A." Vid. Doctor and Stud. p. 154, 146. *Day v. Savadge*, Hob. 87. *Stewart v. Lawton*, 1 Bing. 374. S. C. 8 B. Moore. 414. Serjt Hill, in his copy of the reports, refers to *Forbe's Parliam. Deb. Vol. VII. p. 84, 85*, as mentioning several void acts.

lisle, made anno 35 E. 1. enacts, that the order of the Cistercians and Augustines, who have a convent and common seal, that the common seal shall be in the keeping of the prior, who is under the abbot, and four others of the most grave of the house, and that any deed sealed with the common seal, which is not so in keeping shall be void: and the opinion of the Court (*in an.* 27 H. 6. Annuity 41.) was, that this statute was (a) void, for it is impertinent to be observed, for the seal being in their keeping, the abbot cannot seal any thing with it, and when it is in the abbot's hands, it is out of their keeping *ipso facto*; and if the statute should be (b) observed, every common seal shall be defeated upon a simple surmise, which cannot be tried. Note, reader, the words *of the said statute at Carlisle, anno 35 E. 1. (which is called *Statutum religiosorum*) are, *Et insuper ordinavit dominus Rex et statuit, quod Abbates Cisterci' et Præmonstraten' ordin' religiosorum, &c. de cætero habeant sigillum commune, et illud in custodia Prioris monasterii seu domus, et quatuor de dignioribus et discretioribus ejusdem loci conventus sub privato sigillo Abbatis ipsius loci custodi' depo', &c. Et si forsan aliqua scripta obligationum, donationum, emptionum, venditionum, alienationum, seu aliorum quorumcunque, contractuum alio sigillo quam tali sigillo communi sicut præmittit' custodit' inveniant' a modo sigillat', pro nullo penitus habeantur omnique careant firmitate.* So the statute of 1 E. 6. c. 14. gives chauntries, &c. to the King, saving to the donor, &c. all such rents, services, &c. and the common law controuls it, and adjudges it void as to services, and the donor shall have the rent, as a rentseck, distrainable of common right, for it would be against common right and reason that the (c) King should hold of any, or do service to any of his subjects, 14 Eliz. Dyer 313. and so it was adjudged Mich. 16 & 17 Eliz. in *Com' Banco* in (d) Strowd's case. So if any act of parliament gives to any to hold, or to have consuens of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is party; for, as hath been said, *iniquum est aliquem suæ rei esse judicem*. 5. If he should forfeit 5*l.* for one month by the first clause, and should be punished for practising at any time by the second clause, two absurdities should follow,—1. That one should be punished not only twice but many times for one and the same offence. And the divine saith, *Quod (e) Deus non agit bis in idipsum*; and the law saith, *Nemo debet bis puniri pro uno delicto*. 2. It would be absurd, by the first clause, to punish practising for a month, and not for a lesser time, and by the second to punish practising not only for a day, but at any time, so he shall be punished by the first branch for one month by the forfeit of 5*l.* and by the second by fine and imprisonment, without limitation for every time of the month in which he practises physick. And all these reasons were proved by two grounds, or maxims in law; 1. (g) *Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa*. Instance of the application of the maxim. Raymond 330. Hawkes's Max. 12. Styles 391.

(a) 2 Inst. 588.
2 Brownl. 198,
265.

(b) 2 Brownl.
265.

2 Inst. 587.
[* 118 b.]

(c) Dy. 313. pl.
91. 1 Co. 47 a.
Dav. 2 a. Co.
Lit. 1 b. Cro.
Car. 82, 83.
2 Roll. Rep. 246,
247. 1 Jones
234. Lit. Rep.
43.

5th Reason.

(d) 1 And. 45.
3 Leon. 58.
4 Leon. 40, 41.

(e) 4 Co. 43 a.

(f) 2 Vent. 170.

4 Co. 43 a.

5 Co. 61 a.

11 Co. 59 b.

1 Roll. Rep. 95.

Cawly 78.

Noy 82.

Bridgm. 122.

Cro. Jac. 481.

Wing. Max. 695.

Generalis clausula non porrigitur ad ea

(g) Postea 154 b.

(a) Cro. El.
208. 2 Leon. 47.
Owen 84, 85.
1 And. 245.
6 Co. 64 b.
3 Bulstr. 66,
185. 2 Roll.
Rep. 276.
Winch. 92.
Lanc 69. Lit.
Rep. 64, 67,
289. Styles 391.

[* 119 a.]

*Verba posteriora
propter certi-
tudinem addita
ad priora quæ
certitudine in-
digent sunt re-
ferenda.*

Instance of the
application of
the maxim.

(b) Wing. Max.
67. Lit Rep. 66.
(c) Lit. Rep. 66.
Wing. Max. 67.
Styles 78.

hensa: and the case between Carter and (a) Ringstead, Hil. 34 Eliz. Rot. 120. in *Communi Banco*, was cited to this purpose, where the case in effect was, that A. seised of the manor of Staple, in Odiham, in the county of Southampton in fee, and also of other lands in Odiham aforesaid in fee, suffered a common recovery of all, and declared the use by indenture, that the recoverer should stand seised of all the lands and tene-ments in Odiham, to the use of A. and his wife, and to the heirs of his body begotten; and further, that the recoverer *should stand seised to the use of him, and to the heirs of his body, and died, and the wife survived, and entered into the said manor by force of the said general words: but it was ad-judged, that they did not extend to the said manor which was specially named: and if it be so in a deed, *a fortiori*, it shall be so in an act of parliament, which (as a will) is to be expounded according to the intention of the makers. 2. (b) *Verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda.* 6 E. (c) 3. 12 a. b. Sir Adam de Clydrow, Knight, brought a *præcipe quod reddat* against John de Clydrow; and the writ was, *quod juste, &c. reddat manerium de Wicomb et duas carucatas terræ cum pertinentiis in Clydrow*, in that case the town of Clydrow shall not relate to the manor, *quia non indiget*, for a manor may be demanded without men-tioning that it lies in any town, but *cum pertinentiis*, although it comes after the town, shall relate to the manor, *quia indiget.* Vide 3 E. 4. 10. the like case. But it was objected, that where by the second clause it was granted, that the censors should have *supervisum et scrutinium, correctionem et gubernationem omnium et singulorum medicorum, &c.* they had power to fine and imprison.

To that it was answered,—1. That *this* is but part of the sentence, for by the entire sentence it appears in what manner they shall have power to punish, for the words are, *ac punitionem eorum pro delictis suis in non bene exequendo, faciendo, vel utendo illa facultate*; so that without question all their power to correct and punish the physicians by this clause is only limited to these three cases, *sc. in non bene exequendo, faciendo, vel utendo, &c.* Also this word *punitio* is limited and restrained by these words, *ita quod punitio eorum medicorum, &c. sic in præmissis delinquentium, &c.* which words, *sic in præmissis delinquentium*, limit the former words in the first part of this sentence, *ac punitionem eorum pro delictis suis in non bene exequendo, &c.* 2. It would be absurd, that in one and the same sentence the makers of the act should give them a general power to punish without limitation; and a special manner how they shall punish, in one and the same sentence. 3. Hil. 38 Eliz. in a *quo warranto* against the Mayor and Commonalty of London, it was held, that where a grant is made to the Mayor and Commonalty, that the Mayor for the time being should have (d) *plenum et integrum scrutinium, gubernationem, et correctionem omnium et singulorum mysteriorum, &c.* without granting them any court, in which should be legal proceedings, that it is good for search, whereby a discovery may be made of

(d) Cart. 120,
121.

offences and defects, which may be punished by the law in any court; but it doth not give, nor can give them any irregular or absolute power to correct or punish any of the *subjects of the kingdom at their pleasure. [* 119 b.]

2. It was objected, that it is incident to every Court created by letters patent, or act of parliament, and other courts of record, to punish any misdemeanor done in Court, in disturbance or contempt of the Court, by imprisonment (v). To which it was answered, that neither the letters patent nor the act of parliament has granted them any Court, but only an (a) authority, which they ought to pursue, as it shall be afterwards said. 2. If any Court had been granted them, they could not by any incident authority *implicite* granted them, for any misdemeanor done in Court, commit him to prison without bail or mainprize, until he should be by the commandment of the president and censors, or their successors, delivered, as the censors have done in this case.

3. There was not any such misdemeanor for which any Court might imprison him, for he only shewed his case to them, which, he was advised by his counsel, he might justify, which is not any offence worthy of imprisonment. The second point was, admitting that the censors had power by the act, if they had pursued their authority, or not?

And it was resolved by the Chief Justice, Warburton and Daniel, that they had not pursued it for six reasons. 1. By the act, the censors only have power to impose a fine, or amercement: and the president and censors imposed the amercement of 5*l.* upon the plaintiff. 2. The plaintiff was summoned to appear *coram presidente et censoribus, &c. et non comparuit*, and therefore he was fined 10*l.* whereas the president had no authority in that case. 3. The fines or amercements to be imposed by them, by force of the act, do not belong to them, but to the King, for the King had not granted the fines or amercements to them, and yet the fine is appointed to be paid to them, in *proximis comitiis*, and they have imprisoned the plaintiff for nonpayment thereof. 4. They ought to have committed the plaintiff presently, by construction of law, although that no time be limited in the act, as in the statute of W. 2. cap. 11. (b) *De servientibus, ballivis, &c. qui ad compotum reddend' tenentur, &c. cum dom' hujusmodi servientium dederit eis auditores compoti, et contingat ipsos in arrearagiis super compotum suum omnibus allocatis et allocandis, arrestentur corpora eorum, et per testimonium auditorum ejusdem compoti mittantur et liberentur proximæ gaolæ domini Regis in partibus illis, etc.* In that case, although no time be limited when the accountant shall be imprisoned, yet it ought to be done (c) presently, as it is held in 27 H. 6. 8 a. and the reason thereof is given in Fogassa's case, Plowd. Com. 17 b. that the generality of the time shall be restrained to the present time, for the benefit of him upon whom the pain shall be inflicted, and therewith agrees

(a) Postea
121 a.

Vin. Ab. Court
F.

2. Admitting
the censors had
power, yet they
have not pur-
sued it.

1st Reason.

2d Reason.

3d Reason.

4th Reason.

(b) 2 Inst. 379,
380. W. 2. c. 11.
Plowd. 17 b.
Rast. Account 2.

(c) Postea 120b.
2 Brownl. 266.
2 Inst. 380.
2 Bulstr. 139.
Fitz. Bar. 44.
Br. Account 6.
Br. Det. 16.

Br. Execution 135. Br. Faux Imprisonment 32. 1 Ld. Raym. 483.

(v) Vid. ante note (c) *Bull's case*, p. 102.

[* 120 a.]

5th Reason.

(a) 2 Brownl.
266.

15 R. 2. c. 2.

8 H. 6. c. 9.

t Mod. 125.

(b) Antea 60 b.

41 a. 8 Co. 41.

11 Co. 43 b.

F. N. B. 73 d.

Vin. Ab. Amerc.

1 a. pl. 23.

1 L. Raym. 468.

(c) Anteafo. 38

b. 41 a. 60 b.

F. N. B. 73 d.

10 Co. 103 a.

1 Salk. 200.

8 T. R. 516.

6th Reason.

Rep. Q. A. 146.

(d) 2 Brownl.

257, 262, 265,

266.

Rast. Phys. 7.

Lit. Rep. 169,

172, 173, 212,

213, 248, 249,

350, 351. Cr. Jac. 121.

Cr. Car. 257.

1 Jones 263.

Car. 115.

4 Inst. 251.

(e) 14 & 15 H.

8. cap. 5.

Roll. 598.

4 Inst. 251.

Rast. Phys. 3.

2 Bulstr. 185.

Lit. Rep. 168,

169, 172, 212,

215, 246, 247,

248, 249.

1 Jones 261.

Cro. Jac. 121,

[* 120 b.]

159, 160.

Cro. Car. 256.

Palm. 486.

Cart. 115.

Plow. Com. 206 b. in Stradling's *case. And a Justice (a) of Peace, upon view of the force, ought to commit the offender presently. 5. Forasmuch as the censors had their authority by the letters patent and act of parliament, which are high matters of record, their proceedings ought not to be by parol, *et eo potius*, because they claim authority to fine and imprison, and therefore, if judgment be given against one in the Common Pleas in a writ of (b) recaption, he shall be fined and imprisoned, but if the writ be vicontiel in the county, there he shall not be fined or imprisoned, because a writ of the Court is not of record, F. N. B. in Recaption. So in F. N. B. 47 a. a plea of trespass *vi et armis* doth not lie in the county court, hundred court, &c. for they cannot make a record of fine and imprisonment; and regularly they who cannot make (c) a record, cannot fine and imprison. And therewith agrees 27 H. 6. 8. Book of Entries, tit. Account, fol. —. The auditors make a record when they commit the defendant to prison; a Justice of Peace upon view of the force may commit, but he ought to make a record of it. 6. Forasmuch as the act of 14 H. 8. has given power to imprison till he shall be delivered by the president and the censors, or their successors, reason requires that it should be taken strictly, for the liberty of the subject (as they pretend) is at their pleasure: and this is well proved by a judgment in parliament in this very case; for when this act of 14 H. 8. had given the censors power to imprison, yet it was taken so literally, that the gaoler was not bound to receive such as they should commit to him; and the reason thereof was, because they had authority to do it without any Court: and thereupon the statute of 1 Ma. (d) cap. 9. was made, that the gaoler should receive them upon a penalty, and yet none can commit any to prison, unless the gaoler receive him: but the first act, for the cause aforesaid, was taken so literally, that no necessary incident was implied.

And where it was objected, that this very act of 1 Mar. c. 9. has enlarged the power of the censors, and they urged it upon the words of the act; it was clearly resolved, that the said act of 1 Mar. did not enlarge the power of the censors to fine or imprison any person for any cause for which he ought not to be fined and imprisoned by the said act of (e) 14 H. 8. For the words of the act of Queen Mary are, "according to the tenor and meaning of the said act:" also "shall send or commit any offender or offenders for his or their offence or disobedience, contrary to any article or clause contained in the said grant or act, to any ward, gaol, &c." But in this case Bonham has not done any thing which appears within this record, contrary to any article or clause contained within the grant or act of 14 H. 8. Also the gaoler who refuses shall forfeit the double value of *the fines and americiaments that any offender or disobedient shall be assessed to pay; which proves that none shall be received by any gaoler by force of the act of 14 H. 8. but he who may be lawfully fined or amerced by the act of 14 H. 8. and that was not Bonham, as by the

reasons and causes aforesaid appears. And admitting that the replication be not material, and the defendants have demurred upon it; yet forasmuch as the defendants have confessed in the bar, that they have imprisoned the plaintiff without cause, the plaintiff shall have judgment: and the difference is, when the plaintiff replies, and by his replication it appears that he has no cause of action, there he shall never have judgment: but when the (a) bar is insufficient in matter, or amounts (as the case is) to a confession of the point of the action, and the plaintiff replies, and shews the truth of the matter to enforce his case, and in judgment of law it is not material, yet the plaintiff shall have judgment, for it is true that sometimes the declaration shall be made good by the bar, and sometimes the bar by the replication, and sometimes the replication by the rejoinder, &c. but the difference is, when the declaration wants time, place, or other circumstance, it may be made good by the bar; so of the bar, replication, &c. as appears in 18 E. 4. 16 b. But when the declaration wants substance, no bar can make it good; so of the bar, replication, &c. and therewith agrees 6 E. 4. 2. a good case, and *nota* there *dictum* Coke. *Vide* 18 E. 3. 34 b. 44 E. 3. 7 a. 12 E. 4. 6. 6 H. 7. 10. 7 H. 7. 3. 11 H. 4. 24., &c (e).

But when the plaintiff makes replication, sur-rejoinder, &c. and thereby it appears, that upon the † whole record the plaintiff has no cause of action, he shall never have judgment, although the bar or rejoinder, &c. be insufficient in matter; for the Court ought to judge upon the whole record (f), and every one shall be intended to make the best of his own case. *Vide* (b) Ridgeway's case, in the Third Part of my Reports 52 b. and so these differences were resolved and adjudged between ‡ Kendal and Helyer, Mich. 25 & 26 Eliz. in the King's Bench, and Mich. 29 & 30 Eliz. in the same Court, between (c) Gallys and Burbry.

(b) Styles 354. † 3 Co. 52 b. (c) 3 Co. 52 b. Cro. El. 62. 1 Leon. 242.

And Coke, Chief Justice, in the conclusion of his argument, observed seven things for the better direction of the president and commonalty of the said college for the future. 1. That none can be punished for practising physic in London, but by forfeiture of 5*l.* by the month, which is to be recovered by the law. 2. If any practise physic there for a less time than a month, that he shall forfeit nothing. 3. If any person prohibited by the statute offends in *non bene exeq'*, &c. they may punish him according to the statute within the month. 4. Those who they may commit to prison by the stat. ought to be committed (d) presently. 5. The fines which they

266. 2 Inst. 380. Bar. 44. Br. Account 6. Br. Det. 16. Br. Exec. 135. Br. Faux Imprisonment 32. 2 Bulstr. 139. 6 Mod. 125. 4 B. and C. 596.

The declaration may be made good by the bar, and the bar by the replication, &c. when the declaration, &c. wants time, place, or other circumstance.

(a) 9 Co. 110 b. and ref. Moor. 464. 1 Lev. 195.

But when the declaration, &c. wants substance, no bar, &c. can make it good.

When it appears upon the whole record the plaintiff has no cause of action, he shall never have judgment, although the bar or rejoinder, &c. be insufficient in matter.

† Hob. 199. Hard. 38.

The seven things to be observed for the better direction of the president and commonalty of the college.

1 Ld. Ray. 468.

(d) Antea 119 b. 2 Brownl.

(x) Vid. note (c) *Butt's case*, ante, p. 102. and 1 Williams' Saunders, *Cutler v. Southern*, 118. Vid. also note (r) *Fraunces's case*,

(r) Vid. Com. Dig. Pleader, C. 85. E. 37. ante, p. 326.

[*121 a.] *set, according to the statute, belong to the King. 6. They cannot impose a fine, or imprisonment without a record of it. 7. The cause for which they impose fine and imprisonment ought to be certain, for it is (a) traversable: for although they have letters patent and an act of Parliament, yet because the party grieved has no other remedy, neither by writ of error or otherwise, and they are not made Judges, nor a Court given them, but have an (b) authority only to do it, the cause of their commitment only is traversable in an action of false imprisonment brought against them (c); as upon the statute of (c) Bankrupts, their warrant is under the great seal, and by act of Parliament; yet because the party grieved has no other remedy, if the commissioners do not pursue the act and their commission, he shall traverse, that he was not a bankrupt, although the commissioners affirm him to be one: as this term it was resolved in this Court, in trespass between *Cutt (d)* and *Delabarre*, where the issue was, whether *William Cheyney* was a bankrupt or not, who was found by the commissioners to be a bankrupt; *a fortiori* in the case at bar, the cause of the imprisonment is traversable (h); for otherwise the party grieved may be perpetually, without just cause, imprisoned by them: but the record of a force made by a Justice of Peace is not traversable, because he doth it as Judge, by the statutes of (e) 15 Rich. 2. and 8 Hen. 6. and so there is a difference when one makes a record as a Judge, and when he doth a thing by special authority, (as they did in the case at bar) and not as a Judge. And afterwards for the said two last points, judgment was given for the plaintiff, *nullo contradicente* as to them. And I acquainted Sir Thomas Fleming, Chief Justice of the King's Bench, with this judgment and with the reasons and causes of it, and he well approved of the judgment which we had given: and this is the first judgment on the said branch concerning fine and imprisonment which has

(a) 2 Brown. 266. Hard. 482.

(b) Ante 119 b.

If the commissioners of bankrupt find a party a bankrupt, he may traverse the finding.

(c) 13 El. c. 1.

1 Jac. cap. 15.

(d) 4 Inst. 277,

278.

What a party does as judge is not traversable.

(e) 15 R. 2. c. 2.
8 H. 6. c. 9.

(g) In *Groenvelt v. Burwell*, 1 Ld. Raym. 468. Holt, C. J. observed, that "the opinion of Coke, that the case of the fine and imprisonment is traversable was an opinion *obiter*, and not pertinent to the case there; because Dr. Bonham was committed for practising without licence, and not for malpractice; and the power of commitment does not extend to practising without licence, nor can they inflict the said punishment for such an offence. But Coke enlarges on their power, and includes a commitment for malpractice. But Coke was transported that the doctor was a member of the University, and of his University (as one may see by his excursions in praise of it) which he looked upon as affronted by that prosecution. And as the said opinion was not judicial, so it has not any authority in law for its foundation. Coke himself says, that they ought to make a

"record of their proceedings; then they are Judges of record; and, therefore, according to himself (12 Co. 24.) their acts are not traversable." Vid. *Basten v. Carrew*, 3 Barn. and Cress. 649. S. C. 5 Dow. and Ryl. 558.; note (c) the *Marshalsea case*, Vol. V. p. 383.

(h) "The general rule of law, as to actions of trespass against persons having a limited authority (and commissioners of bankrupt are such persons) is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limits of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to an action." Per Abbot, C. J. *Dorwell v. Impey*, 1 Barn. and Cress. 169. S. C. 2 Dow. and Ryl. 353. citing *Miller v. Seare*, 2 W. Black. 1141.

been given since the making of the said charter and acts of Parliament, and therefore I thought it worthy to be reported and published.

THE CASE OF THE CITY OF [121 b.] LONDON,

Hil. 7 Jacobi I.

Wagoner was arrested upon plaint in the Mayor's Court in debt, at the suit of the Chamberlain of the said city. To a *Habeas corpus* to have the body of the said Wagoner, the return was,—There is a custom in the city of London, that no foreigner shall keep any shop, or use any trade, in London. And there is another custom, that the Mayor, Aldermen, and Commonalty (if any customs be defective) may supply remedy for it; and if any new thing happen, they may provide remedy for it, so it be *congruum et bonæ fidei rationi consonum et pro communi utilitate civium dictæ civitatis et omnium aliorum ad eandem confluentium*. That King Edward 3. by his letters patent granted, that they might make by-laws, and the letters patent were confirmed by act of Parliament, and the return then shews several acts of Common Council made in the time of Ed. 4. and Hen. 8. for inhibiting foreigners to hold any shop or shops, &c.; and penalties imposed; and that after, (shewing the day) an act of Common Council was made; that no foreigner should use any trade, mystery, or occupation, within the said city, nor keep any shop there for retailing, upon pain of forfeiting 5*l*.; and giving power to the Chamberlain to sue for it by action, &c. in the Court of the Mayor; and that such a day Wagoner used the trade (*manualis occupatio*) of making candles; and a plaint was levied, and the defendant arrested. Held, the custom and the by-law made to enforce the observance of it are good.

Semble The omitting in the return to shew that Wagoner sold any candles is supplied by the averment that he used the trade (*manualis occupatio*.) S. C. 2 Brown. 278, 284.

WAGONER
v.
FISH.
P.VIII.—121 b.

A *Habeas Corpus* was directed *Mich. 7 Jacobi*, out of this Court, to the Mayor, Aldermen, and Sheriffs of London to have the body of James Wagoner, who was arrested in London, and remained in the custody of them, or some of them: Sir Thomas Campbel, Knight, Mayor of London, and the Aldermen, and Sebastian Harvey and William Cokein, Sheriffs of

Habeas Corpus.
7 East. 292.
Skin. 374.
Lucas 131, &c.
Rep. 2. A. 49,
147. Raym.
394. 2 Sid. 120,
121. 3 Bulstr.

190. 2 Roll. Rep. 158. Styles 479, 480. 11 Co 53, &c. 1 Wilson 233.

Return.

(a) Raym. 326,
327. Cases in
B. R. in the
time of Lord
Hardw. 407.

[* 122 a.]

(b) 2 Brown.
284, 285.

London, make such a return that the city of London, *est antiqua civitas, quodque in eadem civitate talis habetur, et a toto tempore cujus contraria memoria hominum non existit habebatur consuetudo, usitata et approbata, viz. quod si aliquæ consuetudines in dicta civitate obtent' et approbat' in aliqua parte difficiles sive defectivæ existant, seu extiter' aut aliqua in eadem civitate de novo emergentia ubi remedium prius non existit seu extiterit ordinat' emendatione indigeant sive indigerunt, Major et Aldermanni civitatis præd' pro tempore existent' de assensu communitatis ejusdem civitatis remedium (a) congru' bonæ fidei et rationi consonum, pro communi utilitate civium dict' civitatis et aliorum fidelium domini Regis nunc et progenitorum suorum ad eandem confluent', apponere possint et potuerunt ordinat' quoties et quando eis videbitur expediri, dum tamen ordinatio hujusmodi domino Regi nunc et progenitoribus suis, et populo suo utilis, et bonæ fidei et consona sit rationi. Et ulterius significamus quod dicta consuetudo, et omnes aliæ consuetudines civitatis præd' a *tempore præd', &c. usitata, auctoritate Parliamenti domini Richardi nuper Regis Angliæ secundi post Conquestum, apud Westm' anno regni sui (b) septimo tent' tunc' Majori et Communitati ejusdem civitatis et successoribus suis ratificat' et confirmat' fuer'. Et nos præfati Major et Aldermanni ac Vic' civitat' Lond' præd' ulterius certificamus, quod in communi concilio tent' secundum consuetud' civit' Lond' in Camera Guildhalda ejusdem civitat' decimo quinto die Aprilis, anno regni domini nostri Jacobi nunc Regis Angliæ, &c. quarto, per Leonardum Halliday, Militem, nuper Majorem civitatis Lond' præd', et ejusdem civitatis Aldermannos, de assensu communitatis ejusdem civitatis in eodem communi concilio assemblet' exist' secundum præd' consuetudinem civitatis præd' ordinat' inactitat', et stabilit' fuit, modo et forma, prout in Anglican' verbis sequit', viz. where by the ancient charters, customs, franchises, and liberties of the city of London, confirmed by sundry acts of Parliament, no person not being free of the city of London, may or ought to sell or put to sale any wares or merchandizes within the said city, or the liberties of the same, by retail, or keep any open or inward shop, or other inward place or room, for shew, sale, or putting to sale of any wares or merchandizes, or for use of any art, occupation, mystery, or handicraft within the same. And whereas also Edward, sometime King of England, of famous memory, the third of that name, by his charter made and granted to the said city in the fifteenth year of his reign, confirmed also by Parliament, amongst other things granted, that if any customs in the said city before that time obtained and used, were in any part hard or defective, or any things in the same city newly arising, where remedy before that time was not ordained, should need amendment, the Mayor and Aldermen of the said city, and their successors, with the assent of the Commonalty of the same city, might put and ordain thereunto fit remedy, as often as it should seem expedient to them, so that such ordinance should be profitable to the King, for the profit of the citizens, and other his people repairing to the said city, and*

agreeable to reason. And whereas by force of the said customs, franchises, and liberties, and of the charter last before mentioned, confirmed as is aforesaid by Parliament, the Lord Mayor, Aldermen, and Commons, of the said city, did the 12th day of October in the third year of the reign of Edward, some time King of England the Fourth, as a thing thought fit and convenient for that time (amongst other things) agree and ordain that the basket-makers, gold wire-drawers, or other foreigners, contrary to the liberties of the said city, holding open shops in divers places in the city, and using (a) mysteries within the said city, should not from thenceforth hold shops within the liberty of the city aforesaid; but if they would hold any shop or dwell in the same liberty, they should dwell at Blanch Appleton, and there hold shops, so as they might have sufficient dwelling there. And where also the Lord Mayor, Aldermen, and Commons, of the same city did afterwards, the 16th day of May, in the 17th year of the reign of our late sovereign lord of famous memory King Henry 8. as a matter thought fit and agreeable for that time, ordain, establish, and enact, that no manner of person or persons being estrange from the liberties of the said city, from thenceforth should hold and keep any open shop, within the said city, or liberties of the same, neither with any lattices before, nor yet without lattices (certain numbers of poor men occupying the seat of botchers, tailors, and coblers only excepted) upon pain of imprisonment, and also to forfeit and to pay forty shillings to the use of the commonalty of this city, as often as he or they should do the contrary. And where also the Lord Mayor, Aldermen, and Commons of the same city did afterwards the 20th day of January, in the said 17th year of King Henry 8th, (reciting that where at a common council holden the 16th day of May, in the 17th year of the reign of King Henry 8th, it was ordained and enacted, that no manner of person or persons, being estrange from the liberties of this city, from thenceforth should hold or keep any shop or shops within this city or liberties of the same, neither with any lattices before, nor yet without any lattices, upon pain of imprisonment,) further ordain and establish, that if any person or persons, being foreigners, should hold and keep open any shop or shops, as is afore-said, he should forfeit for every time so doing forty shillings, to be levied by distress, to the use of the Commonalty of the said city, by the Chamberlain for the time being, or other officer of this city, and also have imprisonment by the discretion of the Mayor and Aldermen for the time being. Now forasmuch as divers and sundry strangers and foreigners from the liberties of the said city (nothing regarding the said ancient charters, franchises, customs, or liberties of the said city, and acts and ordinances heretofore made according to the same, but wholly intending their private profit have of late years devised and practised by all sinister and subtle means how to defraud the said charters, liberties, customs, good orders and ordinances, and to that end do inwardly, in private and secret places, usually and ordinarily shew,

(a) Cart. 120.
[* 122 b.]

[* 123 a.]

sell, and put to sale their wares and merchandizes, and use arts, trades, occupations, mysteries, and handicrafts within the said city and liberties of the same, to the great detriment and hurt of the said city, who pay lot and scot, bear offices and undergo other charges which strangers and others not free are not chargeable withal, nor will perform. For reformation of which disorders, and for avoiding of such prejudice and damage as thereby groweth to the freemen of the said city, and is now more of late than was in any time heretofore suffered, and to provide for the common profit and good of the freemen and citizens of this city: it is therefore by the Lord Mayor, Aldermen, and Commons in this common council assembled, ordained and established, that no person whatsoever (not being free of the city of London) shall at any time after the feast of St. Michael now next ensuing, by any colour, way, or mean whatsoever, either directly or indirectly, by himself, or by any other, shew, sell, or put to sale, any wares or merchandizes whatsoever, by retail, within the city of London, or the liberties or suburbs of the same, upon pain to forfeit to the Chamberlain of the city of London for the time being to the use of the Mayor and Commonalty, and citizens of the said city, the sum of five pounds of lawful money of England, for every time wherein such person shall shew, sell, or put to sale any wares or merchandizes by retail, within the said city, liberties, or suburbs thereof, contrary to the true intent and meaning hereof; and it is farther ordained and established, that no person whatsoever (not being free of the city of London) shall at any time after the said feast of St. Michael now next ensuing, by any colour, way or mean whatever, directly or indirectly, by himself or any other, keep any shop or other place whatsoever, inward or outward, for shew or putting to sale of any wares or merchandizes whatsoever by way of retail, or use any art, trade, occupation, mystery, or handicraft whatsoever, within the said city, or the liberties or suburbs of the same, upon pain to forfeit the sum of five pound of lawful money of England, for every time wherein such person shall keep any shop or other place whatsoever, inward or outward, for shew, sale, or putting to sale of any ware or merchandizes whatsoever by way of retail, or use any art, trade, occupation, mystery, or handicraft whatsoever within the said city, or liberties or suburbs of the same, contrary to the true intent and meaning hereof: all which pains, penalties, forfeitures, and sums of money to be forfeited by virtue of this act and ordinance, shall be recovered by action of debt, bill, or plaint to be commenced and prosecuted in the name of the Chamberlain of the city of London for the time being, in the King's Majesty's Court to be holden in the chamber of *the Guildhall of the city of London, before the Lord Mayor and Aldermen of the said city, wherein no essoign or wager of law shall be admitted or allowed for the defendant; and that the Chamberlain of the said city for the time being shall in all suits to be prosecuted by virtue of this act or ordinance against any offender, recover the ordi-

[* 123 b.]

nary costs of suit to be expended in and about the prosecution thereof: and further, that one equal third part of all forfeitures to be recovered by virtue hereof, (the costs of the suit for the recovery of the same being deducted and allowed) shall be, after the recovery and receipt thereof, paid and delivered to the treasurer of Christ's Hospital, to be employed towards the relief of the poor children to be brought up and maintained in the said hospital. And one other equal third part, to him or them who shall first give information of the offences for which such forfeitures shall grow, and prosecute suit in the name of the Chamberlain of the said city for recovery of the same (any thing in this act to the contrary notwithstanding.) Provided always, that this act or ordinance, or any thing therein contained, shall not extend to any person or persons for bringing or causing to be brought any victuals to be sold within this city and the liberties thereof; but that they and every of them may sell victuals within the said city and the liberties thereof; as they might lawfully have done before the making hereof; any thing herein contained to the contrary thereof in anywise notwithstanding.

*Uteriusque nos præfat' nunc Major et Aldermanni ac Vicecom' civitatis præd' certificamus, quod ante adventum brevis dicti domini Regis nobis directi, et hic huic schedulæ annex' Jac' Wagoner in brevi illo nominat' captus fuit in civitat' præd' et in prisonu dicti dom' Regis nunc sub custod' nostrum præfat' Vic' detent' fuit virtute ejusdem billæ original' de pl' debiti super demand' quinque librarum legalis monetæ Angliæ versus ipsum, 9 die mensis Sept' anno regni domini Regis nunc septimo, ad cur' præd' dom' Reg' coram Humfredo Weld Milite, nuper Majore, et Aldermannis civitat' præd' in præd' camera Guildhalda ejusd' civitatis, secund' consuet' civitat' præd' tunc tent' ad sectum Cornelii Fish, camerarii civitat' Lond' super act' Communis Concilii præd' præd' 15 die Aprilis, anno 4. præd' ut præf' confect' affirmat', ejus quidem billæ orig' tenor sequitur in hæc verba, scilicet Cornelius Fish, Camerarius civitat' Lond' qui 7 die Sept' anno regni domini nostri Jacobi nunc Regis Angliæ, &c. septimo. et semper postea hucusque fuit et adhuc existit Camerarius dictæ civitat', per Robertum Smith attornat' suum petit versus Jacobum Wagoner quinque libras legalis monetæ Angliæ quas ei debet et injuste detinet, &c. eo quod cum in Communi Concilio secund' consuetud' civitat' præd' in Camera * Guildhalda dictæ civitat' situat' in parochia sancti Michael' in Bassieshaw in warda de Bassieshaw Lond' præd' decimo quinto die Aprilis, an' Regni dom' nostri Jacobi nunc Regis Angl', &c. quarto, vigore & autoritate Communis Concilii illius ordin' et stabilit' extitit, quod nulla persona quæcunque non existens liber civitat' Lond' ad aliquod tempus post festum sancti Mich' tunc prox' sequen' per aliquem colorem, viam aut modum quæcunque sive directe vel indirecte, per se vel per aliquem alium, ostenderet, venderet, aut ad venditionem poneret, aliqua mercimonia aut merchandisas quæcunque per retal' infra civitat' Lond' libertates aut suburb' ejusd' sub pœna forisfacere camerario civitat' Lond' pro tempore existen' ad usum Majoris et Commun' ac civium dict' ci-*

[• 124 a.]

[* 124 b.]

vital' summam quinque librarum legalis monetæ Angliæ pro quolibet tempore quo talis persona ostenderet, venderet, aut venditioni exponeret, aliqua mercimonia aut merchandisas per retail' infra dict' civitat' libertat' aut suburb' ejusdem, contra veram intentionem actus Communis Concilii præd'. Cumque tunc et ibid' auctoritate præd' ulterius ordinat' et stabili' extitit, quod nulla persona quacunque non existens liber civit' Lond' ad aliquod tempus post dictum festum sancti Mich' tunc prox' sequent' per aliquem colorem, viam aut modum quæcunque directe vel indirecte, per se vel per aliquem alium, teneret, aliquam shoppam aut alium locum quemcunque intra vel extra, Angl' inward or outward, pro ostensione, venditione, aut positione aliquorum mercimonitorum aut merchandisarum quoruncunque ad venditionem per viam retail', Angl' by way of retail, aut uteretur aliqua arte, artifice, occupation', myster', aut manuali occupatione quibuscunque, Angl' any art. trade, occupation, mystery, or handicraft whatsoever, infra civitat' Lond' aut libertat' aut suburb' ejusd' sub pœna forisfacere summam quinque librarum legalis monetæ Angliæ. pro quolibet tempore quo talis persona teneret aliquam shoppam, aut alium locum quemcunque, infra vel extra, Angl' inward or outward, pro ostensione, venditione, aut positione aliquorum mercimonitorum aut merchandisarum quoruncunque ad venditionem per viam retail' aut uteretur aliqua arte, artificio, occupatione, mysterio, aut manuali occupatione quibuscunque, Angl' any art, trade, occupation, mystery, or handicraft whatsoever, infra dict' civitatem, aut libertat' aut suburb' ejusdem, contra veram intentionem actus præd'. Cumque tunc et ibidem auctoritate præd' ulterius inactitatum extitit, quod omnes quæ quidem pœnæ, pœnalitate, forisfacturæ et pecuniæ summæ forisfaciendæ virtute dicti actus sive ordinis, Angl' ordinance, recuperarentur per actionem debiti, billæ, sive querel', commensand' et prosequend' nomine camerarii civit' Lond' pro tempore existentis, in curia regiæ Majestatis *tenend' in camera Guildhalda civitat' Lond' coram Domino Majore et Aldermannis ejusdem civitat' in quibus null' esson' aut legis radiatio admitteretur aut allocaretur pro defend'. Et quod Camerarius dictæ civitatis pro tempore existens in omnibus sectis prosequend' virtute dict' act' sive ordinis, Angl' or ordinance, contra aliquem offensorem, recuperaret ordinari' custag' sectæ, expendend' in et circa prosecutionem ejusdem. Et ulterius, quod una æqualis tertia pars omnium forisfactur' recuperand' virtute dict' act' (custag' sectæ pro recuperatione earum existent' deduct' et allocat') post recuperationem et receptionem inde solteretur et deliberaretur Thesaurario Hospitalis Christi disponenda, Ang' to be employed, erga opem pauper' puerorum educandorum et manutenendorum in dicto hospitali: et una alia æqualis tertia pars illi vel illis qui primum daret information' de offensis pro quibus tales forisfacturæ surgerent, Angl' should grow, et prosequer' sectam in nomine Camerarii dictæ civitatis pro recuperatione earund' aliquo in dicto actu in contrar' non obstante, prout per præd' actum communis concilii præd' plene liquet. Præd' tamen defendens, actum Communis Concilii præd' minime ponderans, nec pœnam in

codem contentam aliquamiter terens post dict' festum Sancti Michaelis in actu præd' mentionat' et ante affirmationem hujus billæ originalis, scil. dicto septimo die Septembris, anno regni domini nostri Jacobi nunc Regis Angl', &c. septimo, præd' infra dict' civitatem London, viz. in parochia Sancti Christophori London' non existens persona liber dictæ civitatis usus est manuali occupatione of a tallow-chandler, contra veram intentionem actus Communis Concilii præd' per quod actio accrevit præfato quærenti ad petend' exigend' et habend' de præfato defend' dict' quinque libras modo petiti' quas dict' defend' præfato quærenti nondum solvit, licet sæpius, &c. ad damnum dicti quærentis quinque solidorum et inde producit sectam, &c. super quam quidem billam original' partes præd' placitaverunt, et sic indeterminat' dependit, &c. Et hæc est unica causa captionis et detentionis præd' Jacobi Wagoner in prisa et sub custodia præd' quam una cum corpore suo coram dict' Justiciariis dicti domini Regis apud Westmonaster' ad diem in brevi præd' content' parat' habemus, una cum dicto brevi, prout nobis interius per idem breve præcipitur.

In this case it was resolved, that the said custom of London, "that no person whatsoever, not being free of the city of London, shall by any colour, way, or mean whatsoever, directly or indirectly, by himself or any other, keep any shop or any other place whatsoever, inward or outward, for shew or putting to sale of any wares or merchandizes whatsoever by way of retail, or use any trade, occupation, mystery, or handicraft, for hire, gain, or sale, within the city of London," is, upon the whole matter disclosed in the return, a good * (a) custom (A); and that such constitution made according to the custom alleged in the return, upon pain of forfeiture of 5*l.*, was also good.

The custom of London, that no person whatsoever, not being free of the city of London, shall by any colour, way, or mean whatsoever, directly or indirectly, by himself or any other, keep any shop or any

other place whatsoever, inward or outward, for shew or putting to sale of any wares or merchandizes whatsoever by way of retail, or use any trade, occupation, mystery, or handicraft, for hire, gain, or sale, within the city of London, is a good custom. And an ordinance made to enforce the custom upon pain of forfeiture, is good.

Cro. El. 352, 353. See three cases in law, &c. 339, &c. (a) Bridg. 140. 4 Inst. 249. Carth. 169.

And as to that. 1. It was resolved, that there is a difference between such a custom within a city, &c. and a charter granted to a city, &c. to such effect; for it is good by way of custom (b) but not by grant; and, therefore, no corporation made within time of memory can have such privilege, unless it be by act of parliament. So a custom, that goods foreign bought (c) and foreign sold within a city shall be forfeited, is good, as appears Dyer, Mich. 10 & 11 Eliz. 279. but

(b) Lutw. 564. Salk. 204. 2 Roll. 203. Mod. Rep. 18. 11 Co. 54 a. 87 b. Bridgman 140.

Cart. 115. (c) Moor 581. 2 Keb. 397. 2 Roll. 597. Post. 126 a. 128 a. 2 Brownl. 287. 1 Jones 162. Dy. 279. pl. 10.

(A) In *Woolley and Another v. Idle*, 4 Burr. 1952., it was held, that a by-law to restrain strangers from using a trade within a city, is good. And in the case of *The Mayor of York v. Welbank*, 4 Barn. and Ald. 438. the Court held, that a custom that none but a

freeman, or the widow or partner of a freeman, should sell by retail in the city of York, or the suburbs, is valid in law. Vid. note (B). *Chamberlain of London's case*, Vol. III. p. 127.

Waltham v. Austin.

No forfeiture can be imposed upon the goods of a subject.

(a) 2 Inst. 47.
Postea 127 b.
Palm. 5.
1 Sid. 441.
Godb. 254.

(b) 2 Brownl. 178, 179.
Owen 67.

Darcy v. Allen.

A grant to have the sole traffic and making of playing-cards, is void.

(c) 2 Inst. 47.
2 Brownl. 287.
Hob. 212.
11 Co. 84 b.
86 a. Moor
671, 672, &c.
Noy 173, 174,
&c. 3 Inst. 182.
3 Keb. 269.
Hard. 55, 163.

Such part of the country which is contributory among themselves to pay common charges, is called the *guildable*; and if there be any special liberty, [* 125 b.] it is called the franchise. *Jeffery at Hay v. Wm. at Ford and Robert Gray.* Prescription to have a free fold through the whole town of H., &c. so that none in the said town ought to have a free fold without agreement made with the party prescribing, is a good prescription.

(d) 2 Brownl. 286.

(e) 2 Brownl. 287, 178. 2 Bul. 195.

such privilege cannot begin by charter (b). And, therefore, in the Fifth Part of my Reports, Trin. 41 Eliz. between *Waltham* and *Austin* (c), in *Communi Banco*, the case was, that King Henry VI. granted to the corporation of (a) *Dyers* in London, power to search, &c. and if they found any cloth dyed with logwood, that the cloth should be forfeited; and it was adjudged, that by the patent no forfeiture can be imposed on the goods of a subject, and therefore in *hujusmodi casibus fortior et potentior est vulgaris consuetudo, quam regalis concessio*. So it appears by the Reg. 105 b. the custom of Rippon is, *quod archiepiscopus (b) Eborum ratione dominii sui de Ripon talem libertatem in villa præd' habeat et a tempore, &c. habuit quod nullus in ead' villa uti debeat seu consuevit officio sive mysterio tinctoris sine licentia ipsius archiepiscopi*.

But Trin. 44 Eliz. in an action on the case between *Edward Darcy, Esq.* plaintiff, and *Thomas Allen*, defendant, the case was, that Queen Elizabeth granted to the plaintiff, that he should have the sole traffic with (c) playing-cards, and should only import them from beyond the sea into this kingdom, also that he should have the sole making of playing-cards in this realm, in such ample manner as *Ralph Bows* had it before; and it was adjudged, that the grant to make playing-cards only, and to restrain trade and traffic was void, because trade and traffic is the life of every commonwealth, and especially of an island.

2 Roll. 214. Postea 129. Cases in law, &c. 131. Lucas 131.

And it is true, trade and traffic cannot be maintained or increased without order and government; and, therefore, the King may erect *guildam mercatorum*, i. e. a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance or diminution of it. And it is to be known, that (d) *guildan* is a Saxon word, and signifies *solvere*, i. e. that all of such fraternity shall be subject to pay scot and lot: and, therefore, at this day such part of the country which is contributory among themselves to pay common charges, is called the *guildable*; and if there be any special liberty, it is called the franchise, 8 E. 3. (e) 37 a. b. *Jeffery at Hay* brought an action of trespass against *William at Ford* and *Robert Gray*, that they wrongfully with force had broken his fold at *Hastings*: the defendant pleaded, that *Johan de Frichborn* was *and yet is seised of the manor

(a) Acc. *Rex v. Corporation of Borton*, *W. Jones* 162. *The Corporation of Weavers v. Brown*, Cro. Eliz. 863. Serjt. Williams's note 3. *Rex v. Kilderby*, 1 Saund. 312 c.

(c) " I cannot find any case in 5 Co. Rep. " either of this name, or on the point for " which the case is cited; and in 2 Inst. 47.,

" the case is cited in the margin with a reference to this page, and not to 5 Co., from " which I infer that the reference here to " 5 Co. is mistaken, though the edition of " 8 Co. in 1611, agrees with this edition." Note in Serjt. Hull's Copy.

of Hastings in fee, and that the said Johan and her ancestors, and all the lords of the said manor whose estate she has, *a tempore cui*', &c. have used to have this franchise, *i. e.* to have a free fold, (*i. e.* *liberam faldam*) through the whole town of Hastings, and to have a lock of wool of the sheep, so that none in the town of Hastings ought to have a free fold without agreement made with her; and if any did erect a fold without agreement, &c. that the lords for the time being had used to abate it, and that Jeffery at Hay the plaintiff, set up a new fold without agreement, wherefore the defendants, as servants to the said Johan, came and disjoined the hurdles, and abated them, &c. And there Parning, Serjeant, took two exceptions to this prescription. 1. That it is in the negative, *scil.* that none ought to have a fold. 2. Because every one of common right might have a fold in his own land, and therefore it would be against reason to oust him out of that which the common law gives him; and although he said that the lords have used to have a free fold, that is of common right also, yet that cannot take from a man that which common right gives him: *et non allocatur*, because the prescription contains an affirmative with a negative, and every prescription is against common right: then the plaintiff replied and said, that the defendants have justified the abating of the fold, by reason of the seigniority of Johan: to which we say, that the place where the fold is set, is out of the lordship of Johan, &c. and no plea, because the said Johan claims the said franchise through the whole town of Hastings, as well out of her lordship as within; whereupon the plaintiff made another replication, by which case it appears, that although folding of sheep is for the maintenance of tillage (which is so much esteemed and favoured in law) yet by custom and usage a man may be barred thereof upon his own land, and another than he, of whom the land is held, may have it; and therewith agree 3 E. 3. 3 a. John de Sedgford's (*a*) case, where the Prior of Trinity of Norwich, lord of the manor of Sedgford, made the like prescription. Mich. 32 & 33 Eliz. in *Banco Regis*, Sir George (*b*) Farmour brought an action on the case against Brook, and shewed that he was seised of the manor of Torcester, in the county of Northampton, in fee, and that all the tenements of the said town are held of his said manor, and shewed that *a tempore cui*' etc. he, and all those, &c. had had a bake-house parcel of the said manor, maintained at their charge; and that this bake-house was sufficient to bake bread for all the inhabitants, and for all passengers through the same town; and the bread so baked, had, used, &c. to be sold at reasonable prices, and that no other person within the said town has used to bake any bread to sell to any person; and it was adjudged *a reasonable custom by † Sir Chr. Wray, *et totam curiam*, and yet this custom restrains a man from exercising his trade within a certain place, *vide* Regist. 105, 127. 11 H. 6. 19. 9 E. 3. 4 (d). There are divers customs in London

8 E. 4. 5.

(*a*) 2 Brownl. 287.

Farmour v. Brook.
A custom that all the tenants of certain houses, parcel of a manor, should bake all bread to be sold to any person, at a bake-house, parcel of the manor, is a reasonable [* 126 a.] custom. *Vide* note 3. *Coryton v. Lithelby*, 2 Saund. 117. (*b*) 1 Roll. 559. Cr. El. 203, 204.

1 Leon. 142. Owen 67. Raym. 327. Bridg. 140. 2 Brownl. 179. 2 Bulst. 195. Styles 421. 2 Roll. Rep. 201. Lit. Rep. 250. † 2 Cro. 596. Cumberb. 53. Lucas. Customs of London.

(d) *Vide* note (b) *Chamberlain of London's case*, Vol. III. p. 127.

Customs of London.

(a) Cr. Car. 347. Hardr. 303.

(b) Hardr. 303. Br. London 24.

(c) 2 Co. 32 a. 5 Co. 91 b.

7 Co. 6 a. Cr. Eliz. 753.

1 Bul. 146.

11 Co. 82 a.

(d) Hardr. 303.

Br. Trespass 74.

Br. London 5.

Br. Custom 10.

(e) 4 Inst. 248.

10 H. 6. 14 b.

15 a. Fitz. Pre-

scription 4.

Br. London 30.

Br. Custom 60.

(f) Hardr. 303.

4 Inst. 248.

Exceptions to the return to the *habeas corpus*.

(g) 5 Co. 82 b.

Cr. Eliz. 409.

Noy 53. Swinb.

328, 329.

Postea 133 a.

[* 126 b.]

(h) Dy. 317. pl.

6. Co. Lit. 288

b.

which are against common right, and the rule of the common law, and yet they are allowed in our books, and *eo potius*, because they have not only the force of a custom, but are also supported and fortified by authority of (a) parliament. 1. They have a custom concerning the arrest and imprisonment of the body of a man, that the creditor may arrest the (b) debtor before the day of payment to drive him to find sureties, L. 5 E. 4. 30 a. 11 H. 6. 3 a. and 2 H. 7. 15. 2 H. 4. 12 b (e). 2. They have a custom to enter the house of another which is his (c) castle; and therefore the custom of London is, that when a chaplain or a priest has a woman in his house or chamber, and one hath an ill suspicion thereof, he who hath such suspicion may come to the constable of the ward (d) or beadle, and with him may enter into the house or chamber of the chaplain or priest, and commit the offender to prison, 2 H. 4. 12 b. 2 H. 7. 15. 3. By their custom the goods of a man in which he hath an absolute property may be forfeited, as in the case before of foreign bought and foreign sold. 4. They have a custom which alters the course of justice, *scil.* where an action is brought before one Judge, to remove it pending the plea before another, as 10 H. 6. 15 a. In an action of debt on an escape of a man taken by *capias* on a statute merchant at the plaintiff's suit, the defendant said, that the custom of London is, that where a plaintiff is affirmed before the Sheriff of London (e) that the mayor at the suggestion of the plaintiff or defendant may send for the parties; and if it be found on examination before the mayor, that the plaintiff is satisfied, he may award that the plaintiff shall be barred; and that the plaintiff affirmed a plaint of this matter, and was examined before the mayor; and on examination it was found that part was paid, and that the plaintiff had taken a bond for the residue, *ideo* the mayor awarded that he should be barred, and it was adjudged, that the custom was good, for that examination was pending the action; and *e contra*, if they prescribe to examine it after (f) judgment, *vide* 1 E. 4. 6 b. executors charged in London on a simple (g) contract; 15 Eliz. Dyer, in London the mayor (h) who is the coroner shall not pronounce the judgment upon the outlawry, but the recorder. And many exceptions were taken to the return, because the custom alleged in the beginning of the return was not pursued. For the custom there alleged consists upon two general parts, *scil.* the mischief and the remedy; the mischiefs were three. 1. If any were difficult. 2. If defective. 3. If a new case arises which *emend' indigeat*; the remedy is, that the mayor and aldermen with the assent of the commonalty, have power by the custom **apponere remedium*, which remedy ought to have five qualities. 1. *Remedium debet esse congruum*, it ought to have fit proportion and congruity. 2. It ought to be *bonæ fidei consonum*. 3. It ought to be *rationi consonum*.

(e) In Brooke's Ab. London, pl. 24., and also in *Day v. Savage*, Hob 86. the custom is differently stated; and it is there said, "If a debtor becomes fugitive, he may be ar-

"rested before the day of payment." Vid. Vin. Ab. Customs of London, G. *Horton v. Beckman*, 6 T. R. 763. Emmerson on the City Courts, 62.

4. *Pro communi utilitate civium et aliorum fidelium ad eandem civitatem confluentium.* 5. *Quod sit utile Regi et populo.* And it was objected, that the said constitution appoints a remedy which has but one of the said five qualities; for it provides only, as appears by the express words of the constitution for the benefit of the freemen of the said city, *scil.* "for avoiding of such prejudice and damage as groweth to the freemen of the said city, &c. and to provide for the common profit and good of the freemen and citizens of this city, it is therefore, &c." by which it appears that this remedy was only made for the freemen of the city, and so not pursuant, *et non allocatur*, because it appears to the Court, that this remedy has all the said five qualities, and therefore it was resolved, that it need not be averred by the party. *Vide* 46 E. 3. 16 b. no price (a) of money shall be expressed in the writ, because it appears of itself, 12 H. 4. 17. the son (b) within age brings an assise of Mortdancester, he need not aver, that it is within the time of limitation, for it appears, *vide* Plow. Com. (c) Partridge's case, 87. the same ground, *vide* 26 H. 6. Gard. (d) 58, &c.

Doct. pl. 86. 13 H. 4. 17 a. Br. Mortdancester 8. 7 Co. 39 b. 11 Co. 25 a. (d) 9 Co. 54 b.

(a) 9 Co. 54 b. Doct. pl. 86. Fitz. Brief. 602. Br. faux Latin, &c. 13. 46 E. 3. 15 a. (b) 9 Co. 54 b. Plowd. 49 b. (c) 9 Co. 54 b.

But for the better understanding of the true reason of the resolution in this case; first, it was observed, that one may be *liber* (e) *homo*, that is a freeman of London by three ways, *scil.* 1. By service, as he who serves his apprenticeship. 2. By birthright, as he who is the son of a freeman of London. 3. By redemption, that is, by allowance of the Court of Mayor and Aldermen, and all these three ways are allowed by the custom of the city of London, and by no other means can a man become a freeman of London: for none can be made free of the city of London by charter; and, therefore, it appears in *Rot. Pat.* 32 E. 3. in *Turri London*, that King Edward III. granted to John (f) Falcount de Luca apothecary, citizen of London, *quod ipse omnibus libertatibus quas civis civitatis præd' habens eadem civitate et alibi infra regnum nostrum Angliæ, habeat, gaudeat, et utatur, et quod de tribus denariis de libra, et omnibus aliis præstationibus et custumis quas alienigenæ de bonis et merchandisis suis infra reg' Angl' solvere tenentur, de propriis bonis et merchandisis ipsius Joh' infra idem regn' ad totam vitam suam sit quitus, et quod plus quam alii cives nostri London indigence pro custumis merchandisarum et aliorum bonorum suorum nobis solvunt solvere non teneatur, nec ad hoc aliququaliter compellatur.* But all these words do not make him a freeman of London, for he ought to attain unto it by one of the said three ways, according to the said custom. And it was said, that he was the first apothecary that ever was in this kingdom. *And it was resolved, that it appears that the remedy appointed by the said constitution has all the said five qualities.

One may be a freeman of London three ways. 1. By service. 2. By birth. 3. By allowance of the Court of Mayor and Aldermen.

(e) 2 Brownl. 286. 4 Inst. 250. 2 Anders. 276. 277. 2 Bulstr. 189, 190. 3 Kep. 225. (f) 2 Brownl. 286, 287.

[* 127 a.]
The remedy appointed has all the necessary qualities.

1. *Quod remedium præd' fuit congruum*, that is, apt and portionable to the offence, for it appears by act of common council in 3 Edw. 4. which inflicts the penalty of 40s. upon a

1. *Remedium fuit congruum.*

foreigner who keeps an open shop, &c. that he who keeps an inward shop is a greater offender than he who keeps an open shop; for London is a market (a) overt every day, except only the (b) sabbath day, but secret places in corners, as the case of the said James Wagoner is, is more dangerous and offensive than outward shops, for there he may use deceit, and is not subject to any search (c); *qui male agit odit lucem*, and, *omnia delicta in aperto leviora sunt*. In 11 H.(6.).7. 19 a. b. the prior of Dunstable brought an action on the case against J.B. butcher, and declared that he was lord of the town of Dunstable, and that he, &c. had a market twice in the week, and the correction of the said market, and that all butchers, and all others who sell meat or any other commodity which came to the said market, that they ought to sell them in the High street of the said town, upon the prior's stalls, paying 1d. to the prior; and that the defendant is a butcher, and sold his meat such a market day within his own house *occulte*, and had procured others so to do, by which, &c. the defendant pleaded that he was a householder in the said town of Dunstable; and all those who are householders in the said town of Dunstable have used a *tempore cujus*, &c. to sell their wares, &c. every market day in their own houses, or where ever else they pleased; and there Cotesmore who gave the rule in the case, and the reason of it, said, this prescription is not to the purpose; for if the prior had a market within the town, and is lord of the town, you cannot prescribe to sell meat in your own house on the market day (f); for the market cannot be but in an open place, and the prior then would lose the benefit of his market, if they might sell their wares in their houses, and also where he has the correction of the market and to see if the things which shall be sold are lawful and vendible, which cannot be tried by his officer if it be not in open market, and also he would lose his toll of the things sold; so that when the market belongs to the prior, which ought to be held in the market-place appointed for that purpose, he cannot + hold a market in his own house, but in the common place, upon the market-day; wherefore, &c. And as it hath been said, London has a market every day in the week, Sunday only excepted, *vide* Mich. 32 and 33 Eliz. in the Fifth Part of my Reports, 63 a. a constitution (d) in London, that all broad cloth by citizen or foreigner shall be put up to sale at Blackwell hall, so that it may appear to be saleable. And note there a penalty inflicted for the restraint of a lawful act, but here, of an unlawful. And therefore if a foreigner who keeps an open shop shall forfeit forty shillings, he who is a foreigner *and offends

Prior of Dunstable

v.
J. B.

If one who is lord of a town has a market within the town, there cannot be a custom for a party to sell meat in his own house on the market day.

(a) 2 Brownl. 288. 5 Co. 83 b. Dyer 122. pl. 16. Cr. El. 454. 35 H. 6. 29 b. Moor 360. 625. 2 Inst. 713. Poph. 34. 1 Anders. 344. 2 Anders. 115. 3 Co. 78 b. 9 Co. 66 b. (b) 9 Co. 66 b. Cr. Jac. 280. 496. Jenk. Cent. 291. 1 Jones 156, 157. Cawly 78. Dy. 168. pl. 17. Hales pl. Co. 47. 2 Brown. 288.

London has a market every day in the week, Sunday only excepted.

(c) 8 Co. 37 b. 9 Co. 66 a. 2 Brown. 288. 1 Leon. 143. + 4 T. R. 274. [* 127 b.]

(d) 1 Roll. 364. 3 Leon. 264. Hob. 212. Moor. 580. 2 Jones 145. Cr. Car. 498. Treb. Argument in Quo Warranto 33. Pollexfen's Argument in Quo Warranto 81. Hard. 56, 210. Lane 24. Bridgm. 143, 141. 2 Roll. Rep. 115. 1 Roll 366. 2 Brown. 287, 288.

(f) Acc. Br. Prescription 98. Roll. Ab. Market C. p. 1. Vin. Ab. Market II. 2. Contra, Roll. Ab. Customs E. pl. 15. Vin. Ab. Customs E. pl. 15. Vid. *Bailiffs of*

Tewkesbury v. Diston, 6 East 448.

(c) Vid. note (b), *Chamberlain of London's case*, Vol. III. p. 127.

in secret corners is worthy to forfeit 5*l*. And it was also observed, that the value of an ounce of silver since 3 Ed. 3. has been raised. Also *remedium fuit congruum* in respect of the manner of punishment, *sc.* by imposing a pecuniary pain, and not a corporal pain, *sc.* imprisonment; and therewith agrees the said case of Blackwell-hall, Mich. 32 and 33 Eliz. and Trin. 38 Eliz. in the Fifth Part of my Reports, fol. 64 a. Clark's case, (a) a constitution cannot be made on pain or imprisonment (H); and the case cited before of Trin. 41 Eliz. *inter* Waltham (b) and Austen, that a constitution cannot be made on pain of forfeiture of goods; therefore it ought to be on a reasonable pecuniary pain, or not at all.

(a) 2 Inst. 54.
1 Roll. 363,
365, 367. Moor
411. 580, 412.
2 Bul. 328.
Stiles 85. 1
Roll. 599.

1 Jones 162. Cr. Argument 22. 2 Brown. 288. Bridg. 141, 142.
2 Inst. 47. Dyer 279 b. in Marg.

(b) Ante 125 a. Palm. 5.

2. *Remedium fuit bonæ fidei consonum*: for the remedy is to suppress that which is done *mala fide* and in deceit to defraud the said custom.

2. *Remedium fuit bonæ fidei consonum.*

3. *Remedium fuit rationi consonum*; for it is the rule of law and reason, *quod (c) clam delinquens magis punitur quam palam.*

3. *Remedium fuit rationi consonum.*

4. *Remedium fuit pro utilitate civium et aliorum.* 1. *Civium*, for foreigners are not subject to scot and lot, &c. 2. *Aliorum*, for the confluence of people from all the parts of the realm to London produces three great inconveniences. 1. *Depauperationem*, *sc.* impoverishing of all the good towns in England. 2. *Depopulationem*, depopulation of towns in every country. 3. *Destructionem*, destruction in the end of all trades and tradesmen in every part of the realm. 4. *Civium et aliorum*, by the pestilence, by reason of the multitude of people, and pestering of the air, whereby it is dangerous, not only to the subjects, but also to the King himself, and the great lords who attend upon his royal person.

4. *Remedium fuit pro utilitate civium et aliorum.*

(c) 2 Brown. 289.

5. *Remedium fuit utile Regi et populo*; not only for avoiding the pestilence as before is said; but also if London should daily increase, it would be in time so populous, that it would become ungovernable by the magistracy of the city: and, as when the city of London (which is *tanquam (d) epitome totius regni*) is not well governed, all the parts of the kingdom find the inconvenience thereof; so when this city is well governed, all the parts of the kingdom are kept in better order, *quod utile est Regi et populo.* Also the city would become so populous that it would not be subject to search, &c. whereby fraud and deceit would increase in all wares and vendible commodities, not only to the prejudice of the city itself, but also of the King and the whole realm. Secondly, it was objected, that the said return consists much in recital, which ought to have been directly and certainly alleged. To which it was answered and resolved, that this is not on a demurrer in law, but a return on writ of privilege, upon which no issue can be taken, or demurrer joined, neither upon our award

5. *Remedium fuit utile Regi et populo.*

(d) Post. 130 a.

Strange 537.

(H) Vid. note (A), Clark's case, Vol. III. p. 129.

[* 128 a.] herein doth any writ of error lie, and therefore the *return is no other but to inform the Court of the truth of the matter, in which such a † precise certainty is not required as in pleading. Thirdly, it was objected, that by the statutes of 9 E. 3. c. 1. and 2. 25 E. 3. c. 2. 27 E. 3. c. 11., &c. it was enacted, that every one might sell any commodities, or things saleable in any city, &c. in gross, or by retail, and that every statute, charter, letters patent, proclamations, usage, allowance, or judgment to the contrary are void. To which it was answered and resolved,—

1. That the statutes extend only to merchants, aliens, and denizens, which import and export vendible things, and do not extend to take away the custom of a city of foreign bought, (a) foreign sold, as it was resolved, *ut supra*, Mich. 10 and 11 Eliz. Dyer, in the case of the city of York; and *vide* the statute of 2 R. 2. cap. 1. which restrains the sale of wares by retail, &c. by merchants, aliens, &c.

1. The statutes 9 E. 3. c. 1 and 2. 25 E. 3. c. 2., &c. extend only to merchants, aliens, and denizens, which import and export vendible things, and do not extend to take away the custom of a city of foreign bought and foreign sold. (a) Ante 125 a. 2 Brown. 287. Dy 279. pl. 10. Moor 582. 2 Roll. 597. 1 Sand. 312. Cr. El. 110.

2. These statutes do not extend to tallow-chandlers, or other such like artificers, nor to any manufactures made by them within the realm.

2. These statutes do not extend to tallow-chandlers, &c. or to manufactures made by them within the realm.

3. Notwithstanding all the said statutes, no one whatsoever who was not a freeman of the city of London could sell any merchandize by retail within the said city.

3. It appears by the judgment of the whole Parliament, *anno* (b) 7 Hen. 4. cap. 9. that notwithstanding all the said statutes, it was not lawful within the city of London (the charters whereof are established and confirmed by many Parliaments) for any, be he merchant, alien, denizen, or other liege man whatsoever, who was a stranger or foreigner to the liberty of the city of London, *scil.* who was not a freeman of the said city, to sell any merchandizes by retail, &c. within the said city; and by the same act it was ordained and established, that as well the drapers and sellers of cloths, as other merchants with other merchandizes, as wine, iron, oil, wax, and other things appertaining to merchandize, be free to sell in gross their merchandize, *scil.* their cloths, iron, oil, wax, and other their merchandizes, as well to any of the king's subjects as to the citizens of London, notwithstanding any liberty or franchise granted to the contrary, which act had been made in vain, if the city of London had been restrained by the said former acts: but because the said act did tend to the great hindrance of the Mayor and citizens aforesaid, and very like to be the destruction of the citizens, and against their grants and confirmations, as the next Parliament, *scil.* *anno* (c) 9 Hen. 4. an act of Parliament not printed was made, (which is to be seen in *Rot. Parliamenti apud Glou'* 28 Octobris *anno* 9 Hen. 4.) in these words following. *Item*, the Commons pray, that as by divers Kings of England, your progenitors and predecessors, our sovereign lords, by their charter confirmed by you by authority of Parliament amongst

(b) 4 Inst. 249.

(c) 4 Inst. 249. Cotton Records 466.

Note.

[* 128 b.] other franchises and liberties to the * Mayor and citizens of London, and their successors, it has been granted, that no merchant stranger to the liberty of the said city should sell any

merchandizes within the liberty of the said city to other merchant stranger, nor such merchant stranger should buy of other merchant stranger any merchandizes, under forfeiture of the said merchandizes: which franchises and liberties the said Mayor and citizens of London which now are, and their predecessors, by authority of the said grants and confirmations, have had and enjoyed ever since till at your last Parliament holden at Westminster, in the which by authority of the same Parliament their said article of their said liberties was revoked and annulled by statute, so that as well drapers and sellers of cloth, as other merchants, with their divers merchandizes, as wine, iron, oil, and wax, and other things belonging to merchandizes, are free to sell in gross their cloths and other their merchandizes aforesaid, as well to any of the King's liege people, as to the said citizens of London, notwithstanding any franchise or liberty granted to the contrary; to the great prejudice of the Mayor and citizens aforesaid, and the likely destruction of the said citizens against the grants and confirmations aforesaid: that it would please you our sovereign Lord, with the assent of the Lords Spiritual and Temporal in this Parliament to repeal and annul the said statute in your said last Parliament touching that article: so that the said Mayor and citizens, and their successors, be entirely restored to their said liberties and franchise by statute: so that from henceforward no merchant, being a stranger to the liberty of the said city, sell any merchandizes within the liberty of the said city to other merchant stranger; nor that such merchant stranger buy of other merchant stranger any such merchandizes within the liberty of the said city under forfeiture thereof. Saving and reserving to all lords, knights, esquires, and all other liege denizens of our sovereign lord the King, power at their will to buy within the liberty of the said city of any merchant, stranger, merchandizes in gross to their own use, so that they do not sell them again to any other. The King wills, that the citizens of London have their liberties and franchises touching this article, as entirely as they had before the last Parliament held at Westminster, the statute made at the said Parliament notwithstanding. *Nota*, reader, this act is not only a good exposition and explanation of the former statutes *touching this matter: but also a good demonstration of the custom and liberty of the city of London in these points. In London a citizen and freeman may, by their custom, devise in (a) mortmain (1), notwithstanding the statute of mortmain be to the contrary; and so in other like cases. *Vide* 8 H. 7. 4 b. 9 H. 6. 58. 7 H. 6. 1 a. 45 Ed. 3. 26 b. 28 Ass. 25. 5 H. 7. 10 a. 11 H. 7. 21 a. 23 Eliz. Dyer 373. for all the customs of London are established and confirmed by act of parliament, as appears by this return.

Answer.

[* 129 a.]

By the custom of the city of London, a citizen and freeman may devise in mortmain, notwithstanding the statute of mortmain.

(a) 2 Bulst. 189.

1 Roll. 556. Dyer 255. pl. 3. 373 b. pl. 13. Br. Cust. 41. 7 Br. Dev. 51, 22. 5 H. 7. 19 b. 7 H. 6. 1 a. 28 Ass. 24.

(1) *Vid.* note (a), *The Warden and Commonalty of Sadlers' case*, Vol. II. p. 427.

The five parts
of the return.

And it was observed, that in the case at bar, in the said return there are five general parts:—1. The custom. 2. The general act to enable and preserve this custom, which was before all the said statutes. 3. A particular charter, *anno* 15 Ed. 3. which of itself was not sufficient, and therefore it was confirmed and established by act of parliament. 4. Former precedents of constitution in the like cases, *viz.* in 3 E. 4. and 17 Hen. 8. 5. The constitution upon which the action was brought in London.

The return did
not shew that
W. sold any
candles, &c.;
it seems that it
is implied by
the averment
that it is his
trade.

(a) Bridg. 140.
141. 11 Co. 54
a. Hob. 111,
183. Moor 886.
Cr. Car. 499.
Jenk. Cent. 284.
13 Co. 12. Palm.
544. Lit. Rep.
251.

(b) 11 Co. 54 a.
Moor 869.
Godb. 253.
Hard. 56. Cart.
119. Palm. 396.
Hob. 183, 211.
2 Roll. Rep. 391.
1 Sid. 303.
2 Keb. 125.
2 Bulstr. 186.
1 Roll. Rep. 10.
Calthorp 9.
3 Bulstr. 179.
Styles 223, 383,
479. Cr. Jac.
85, 179. Cr. El. 737. Cr. Car. 316, 347, 499, 516. 2 Roll. 579. 1 Jones 412. Noy 5. Hutt. 99, 132. 5 Co. 63 b.

But the Court took advisement upon one part of the return, by which it is averred, *Quod Jacobus Wagoner usus est manuali occupatione de tallow chandler, &c.* and doth not shew that he sold any candles, &c. for if he made them for his own use (a), without selling any for lucre or gain, he might well do it, as every one may bake or brew, &c. for his own use, without selling bread or beer: but it seems that is implied by the said averment, that it is his trade (κ); by which he lives by sale of his commodities of his trade, and not only to make them for his own use, for it is not properly said, that one uses a manual occupation; when he makes no more than for himself, as he who brews or bakes for his own use, it is not properly said, that he uses the manual occupation of a brewer or baker, and that appears by the statute of 5 Eliz. cap. 4. (b) for there it is enacted, "That every person being an householder, and four-
" and-twenty years old, &c. and using and exercising any art,
" mystery, or manual occupation, shall, &c. have and retain,
" &c. an apprentice, &c." But without question, he who uses the making of any manufacture for his own use, as making of candles, &c. cannot retain any apprentice within the statute of 5 Eliz. So in another part of the act it is enacted, "That it
" shall not be lawful to any person or persons, &c. to set up,
" occupy, use, or exercise any craft, mystery, or manual oc-
" cupation, except he shall have been brought up therein seven
" years at the least, as an apprentice, &c." (l). And yet he who

(κ) In the report of this case in Browlow, Vol. II. p. 289., it is said that Wagoner was delivered, and not remanded, because the return was only that "he kept a shop, and used the mystery of making candles:" but if the return had been "that he used the trade of tallow chandler," this had been good.

(l) By stat. 54 Geo. 3. c. 96. reciting that whereas by an act passed in the fifth year of the reign of her late Majesty Queen Elizabeth, intituled, "An act containing divers orders for artificers, labourers, servants of husbandry, and apprentices, it was enacted, that from and after the first day of May then next coming, it should not be lawful to any person or persons, other than such as did then lawfully use or ex-
" ercise any art, mystery, or manual occu-

" pation, to set up, occupy, use, or exercise
" any craft, mystery, or occupation, then
" used or occupied, within the realm of
" England or Wales, except he shall have
" been brought up therein seven years at
" least as an apprentice; nor to set any per-
" son on work in such mystery, art, or oc-
" cupation being not a workman at that
" day, except he shall have been apprentice
" as aforesaid, or else having served as an
" apprentice as aforesaid, shall become
" journeyman, or hired by the year; upon
" pain that every person willingly offending,
" or doing the contrary, shall forfeit and
" lose for every default 40s. for every month:
" and whereas it is expedient that so much
" of the said act should be repealed; it is
" enacted, that so much of the said recited
" act shall be, and the same is hereby re-

bakes, brews, makes candles, &c. for his own use, is not said in law to use any manual occupation : and upon this branch, and much to this purpose, a judgment was given in the Court of Exchequer, and afterwards affirmed in a writ of error in the Exchequer-chamber, *Mich. 6 Jacobi*; and the case, worthy to be known, was such. Taylor did inform in the Exchequer, on the statute of 5 Eliz. c. 4. *tam pro dom' Rege, quam pro seipso*, against (a) Shoile, that he had exercised the art and mystery of a brewer, &c. for divers months against the said act; and † averred, that the defendant did not use or exercise the art or mystery of a brewer at the time of the making of the said act, nor had been an apprentice for seven years at the least, in the art and mystery of a brewer, according to the said act, &c.

[* 129 b.]

Shoile's case.
The trade of a brewer is an art and mystery.

(a) Cr. Jac. 178, 179. Jenk. Cent. 234.
13 Co. 11, 12.
Shoile's case.
M. 6 Jac.

† Salk. 611. Palm. 393.

The defendant demurred in law upon the information, and judgment was given against him by the Barons of the Exchequer, on which judgment a writ of error was brought in the Exchequer-chamber, and *Mich. 6 Jacobi Regis*, the matter was argued by counsel on both sides : and two errors were assigned, one, that a brewer is not within the said branch of the said act, on which the information is conceived, for the words are, "That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, use, or exercise any art, mystery, or occupation, except he shall have been brought up therein seven years at the least, as an apprentice : " and it was said, that the trade of a brewer is not any art, mystery, or manual occupation within the said branch, because it is easily and presently learned, and need not have seven years apprenticeship to be instructed in it, for every housewife in the country can brew ; and the statute of (b) 22 Hen. 8. cap. 13. declares, that a brewer is not a handicraft artificer. The other error was, that the said averment was not sufficient, for the (c) averment ought to be as general as the exception in the statute is, sc. that the defendant did not use any art, mystery, or occupation, at the time of the making of the act ; for by their pretence, if he exercised any art, mystery, or manual occupation then, as a tailor, carpenter, &c. he might now use any other art, mystery, or manual occupation whatsoever. As to the first, it was resolved, that the art of a (d) brewer, *scil.* to keep a common brew-house to sell beer to any other, is an art, mystery, and manual occupation within the said branch of the act ; for in the beginning of the act it is enacted, " That no person shall retain for less time than a whole year in any of the sciences, crafts, mysteries, or arts of clothing, &c. bakers, brewers, &c. cooks, &c." So that by the judgment of that

(b) 13 Co. 12.

(c) 13 Co. 12.

(d) Palm. 542.
Cr. Jac. 178.
13 Co. 12. Hetl. 102. 2 Bulstr. 189, 190. Jenk. Cent. 284.

"pealed, and declared to be null and void to all intents and purposes whatsoever."

By s. 4. it is enacted. " that this act, or any thing herein contained, shall not extend, or be construed to extend, to defeat, alter, or prejudice the custom and order of the city of London concerning appren-

tices, or the ancient custom, usages, privileges, or franchises of the said city, or of any other city, town, corporation, or company lawfully constituted, or the citizens and freemen thereof; or any bye-law or regulation of any corporation or company lawfully constituted."

He who brews or bakes for his own use, does not exercise
[* 130 a.]
any art, &c.
against stat.
5 Eliz.

(a) Lit. Rep.
251. 11 Co. 54a.
Bridg. 140, 141.

11 Co. 54 a.
Hob. 183, 211.
Moor 886.

Cr. Car. 490.
Jenk. Cent. 284.
13 Co. 12.
Palm. 544.

(b) Lit. Rep.
251. Cro. Jac.
178. Cro. Car.
499. 11 Co. 54a.

13 Co. 12.
Bridgm. 140,
141. Hob. 183,
211. Moor 886.
Jenk. Cent. 284.

Palm. 544.
(c) 13 Co. 12.
(d) 13 Co. 12.

(e) Co. Lit. 125
a. 9 Co. 13 a.
12 Co. 66.
13 Co. 12.

(f) 13 Co. 12.

(g) 4 Inst. 247.
2 Brownl. 286.

(h) 4 Inst. 247.
2 Brownl. 286.
(i) 4 Inst. 247.

(A) Antea 127b.

very parliament, the trade of a brewer is an art and mystery ; which words are in the said branch upon which the said information is grounded. And it was resolved, that he who brews or bakes, &c. for his own (a) use, doth not use or exercise any art, mystery, or manual occupation against the said act ; for the said words imply, that he ^{*so} use or exercise the art, mystery, or manual occupation, that by sale of the commodities of his occupation he gets his living : but to say, that it is not any art, mystery, or manual occupation, because every housewife brews for her (b) private use ; so likewise she bakes and dresses meat, &c. and yet none can keep a common bakehouse, or cook's-shop, to sell to others, unless he has been an apprentice, &c. according to the said act, for they are expressly named also in the act, as arts and mysteries : and the act of 22 Hen. 8. explains, that a brewer, baker, chirurgeon (c), or scrivener alien, &c. are no handicraftsmen within the purview and intention of certain penal laws : but that doth not prove that they are not arts or mysteries ; for art or mystery is more general than handicraft, for that is restrained to manufactures, but not within the penalty of the said statutes ; and it is no question, that in truth they all are arts, mysteries, or manual occupations. As to the second, it was resolved, that (d) the intent of the act was, that none should take upon him any art, mystery, or manual occupation, but such in which he had skill and knowledge : and, therefore, the statute intended, that he who used any art, mystery, or manual occupation, at the time of the said act, might use the same art or mystery ; for (e) *quod quisque norit in hoc se exerceat* ; and the words of the said branch are, *as now do lawfully use, &c.* And it was said, that it was (f) very necessary that brewers should have skill and knowledge in brewing good and wholesome beer, for that doth much conduce to men's health. And so the first judgment was affirmed. And in this case at the bar, as well by the Serjeants as by the Justices in their arguments, much was said of the antiquity of the city of London. Ammianus Marcellinus, who wrote about 1200 years past, saith, that then it was (g) *op-pidum vetustum*. Cornelius Tacitus, (who married the daughter of Cneius Lucius Agricola, and who was in this kingdom with Agricola seven years) saith, *Quod Londinum tempore Neronis* (which is above 1500 years ago) was (h) *copia negotiatorum et commeatu maxime celebre*. And omitting all that (i) Stephanides (who wrote in the reign of Henry II.) has said of the honour and antiquity of this city, I say, *Quod hæc est camera Regis, cor reipublicæ, et tanquam (k) epitome totius regni.* [See Cart-hew 163]

THE CASE OF THETFORD SCHOOL, &c. [130 b.]

Pasch. 7 Jacobi I.

Land of the value of 35*l.* a year was devised to certain persons, and their heirs, for the maintenance of a preacher, &c. of a master and usher, and of a grammar school, and of certain poor people: special distribution was made amongst them by the testator in the same will; the sums distributed amounting in the whole to 35*l. per annum*, the then yearly profit of the land. The land became of greater value. Held, the devisees shall not take the surplus, but such surplus shall be expended in maintaining a greater number of poor.

The case nom. Gibbons v. Maltyard and Martin, *Poph.* 6. *S. C. Moore* 594., sometimes said to be the same case, is an earlier case upon the same will, and the points moved are different.

UPON a private bill exhibited in the parliament for erection of a free-school, maintenance of a preacher, and of four poor people, *scil.* two poor men, and two poor women according to the will of Sir Thomas Fulmerston, Kt. a question was moved by the Lords, and was such: land of the value of 35*l.* anno 9 *Eliz. Reginae*, was devised by will in writing to certain persons and their heirs, for the maintenance of a preacher four days in the year, of a master and usher of a free grammar-school, and of certain poor people; and a special distribution was made by the testator himself, in the same will, amongst them, of the revenues, *scil.* to the preacher a certain sum, and certain sums to the schoolmaster and usher, and to the poor people, amounting in the whole to 35*l. per annum*, which was the yearly profit of the land at that time; and afterwards the land became of greater value, viz. of the value of 100*l.* per ann. Now two questions were moved,—1. Whether the preacher, schoolmaster, usher, and poor, should have only the said certain sums appointed to them by the founder, or that the revenue and profit of the land should be employed to the increase of the stipend of the preacher, schoolmaster, usher, and poor? 2. If any surplusage *remained, how it should be employed? And it was resolved, on hearing of counsel learned on both parts, several days at Serjeant's Inn, by the two Chief Justices, and Walmsley, Justice (to whom the Lords referred the consideration of the case) that the revenue and profit of the said land should be employed to the increase of the stipend of the preacher, schoolmaster, &c. and poor; and if any surplusage remained, it should be expended for the maintenance of a greater (a) number of poor, &c. and nothing should be converted by the de-

Cr. El. 288.
Duke sur Charitable Uses 78, 79, 80.

[* 131 a]

(a) 10 Co. 30 b.

vises to their own uses (A). So in the case in question, where lands in Croxton, in the county of Norfolk, were devised by Sir Richard Fulmerston, to his executors, to find the said works of piety and charity, with such certain distribution as is aforesaid; and now the value of the manor was greatly increased, that it shall be employed in performance and increase of the said works of piety and charity instituted and erected by the founder: for it appears by his distribution of the profits, that he intended the whole should be employed in works of piety and charity, and nothing should be converted to the private use of the executors or their heirs. And this resolution is grounded on evident and apparent reason; for, as if the lands had decreased in value, the preacher, schoolmaster &c. and poor people, should lose; so when the lands increase in value, *pari ratione* they shall gain. And they said, that this case concerned the colleges in the universities of Cambridge and Oxford, and other colleges, &c. For in ancient time, when lands were of small yearly value, (victuals then being cheap) and were given for the maintenance of poor scholars, &c. and that every scholar, &c. should have 1*d.* or 1*d.* ob. a day, that then such small allowance was competent in respect of the price of victuals, and the yearly value of the land; and now the price of victuals being increased, and with them the annual value of the lands, it would be now injurious to allow a poor scholar 1*d.* or 1*d.* ob. a day, which cannot keep him, and to convert the residue to private uses, where, in right, the whole ought to be employed to the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed, and nothing to any private use; for every college is seised *in jure collegii, scilicet*, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses. *Panis egenitium (a) vita pauperum, et qui defraudat eos homo sanguinis est.* And afterwards, upon conference had with the other Justices, they were of the same opinion; and according to their opinions, the bill passed in both houses of Parliament, and afterwards was confirmed by the King's royal assent. *Note*, reader, there is a good rule in the act of Parliament called *Statutum Templariorum: ita semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et expleatur, et perpetuo sanctissime perseveret.*

[* 131 b.]

(a) Duke sur
Charitable Uses
72. Hern sur
Charitable Uses
80. Co. Lit.
342 a. 4 Co.
106 a.

(A) " The doctrine laid down in the *Thetford* case, which has been adhered to since, " was that if the whole land and rents of it " at the time are given for a charity, those " to whom the lands are given must, if there " is an increase in the rents, apply them to " charitable purposes. There are other " cases where the same doctrine has been " held, not only where the gift has been of " lauds, but where it has been of rents and

" profits.—If I give an estate to trustees, and " take notice that the payments are less than " the amount of the rents, no case has gone " so far as to say, that the *cestui que trust*, " even in the case of a charity, is entitled " to the surplus; there would either be a " resulting trust, or it would belong to the " person who takes the estate." *Per Lord Chancellor Eldon, Attorney General v. Mayor of Bristol*, 2 Jac. and Walk. 307.

TURNOR'S CASE,

[132 a.]

Pasch. 8 Jacobi I.

In the Common Pleas.

In debt upon bond against administrators, they pleaded several former judgments obtained against them in the Court of Chichester, amounting in the whole to 514*l.* 8*d.* and that they had not goods or chattels of the intestate in their hands to be administered except to a less value. The plaintiff replied that the defendants had compounded for a less sum, and that the judgments are kept on foot by covin to defraud him, &c. Upon demurrer to this replication judgment was given for the plaintiff.

TURNOR
v.
LAWRENCE
and
Others.
P.VIII.—132 a.

One of the judgments pleaded in bar was obtained in the Court at Chichester, held before the Mayor, in debt upon bond: but the judgment, as pleaded, did not shew that the Mayor had jurisdiction or power to hold a Court, and the declaration in the inferior Court stated that the action of debt was for 100*l.* without mentioning any bond, but the defendant in the inferior Court in his bar confessed that the debt was due by bond. Held, the defendant's bar, as to the judgment recovered in the said Court, is insufficient.

When by the replication it appears that the plaintiff has no cause of action, he shall not have judgment although the bar be insufficient: but where the defendant's bar is insufficient in substance, and the plaintiff in his replication shews no matter against himself, the Court shall adjudge upon the whole record, and judgment shall be given for the plaintiff.

TERMINO Michaelis, anno 6 Jacobi, Rot. 1811. Edward Turnor, Gent. executor of E. Turnor, brought an action of debt against Ed. Lawrence, and others, administrators of Richard Booker, on a bond of 100*l.* made by the said Richard Booker to E. Turnor, the testator: the defendants pleaded in bar a former judgment in the King's Bench, upon several bills, which amounted to 60*l.*, &c. *Et ulterius dic' quod alias scilicet ad curiam domini Regis tent' apud civitatem Cicestr' in Guildhalda civit' præd' coram Roberto Adams tunc Majore dictæ civit' die Lunæ, videlicet 23 die Febr' anno regni ipsius dom' Regis quarto, Thomas Billet querebatur versus ipsos Edw' et alios defendentes administratores dicti Richardi Booker de placito quod iidem Edward', &c. redderent ei centum libras quas ei adtunc injuste detinuerunt, super quo ad eandem curiam iidem*

Bridgm. 80.
See Skinner
407, 496.
Carthew 431.
Lucas 191, 205.

[* 132 b.]

(a) Vaugh. 104.
Bridgm. 80.
9 Co. 108 b.
1 Saund. 333.
(b) Bridgm. 80.

(c) 3 Keb. 577.
1 Roll. Rep.
504. Latch.
111. 9 Co. 109
a. 1 Jones 92.

*Edw' Lawrence, &c. Solemniter exacti fuerunt, et per Leonard Smith, attorn' suum comperuerunt et tunc' dixerunt quod ipsi non potuerunt dedicere actionem præd' Thomæ Billet præd', nec quin scriptum obligator' virtute cuius idem Thomas Billet debitum præd' de eisdem Edwardo, &c. exigebat, fuit factum præd' Rich' Booker nec quin præd' Richard' Booker, in vita sua debuit præd' Thomæ Billet præd' debitum centum librarum, modo et forma prout præd' Thomas Billet, ad tunc versus eos querebatur : whereupon judgment was given in the same Court for the said Thomas Billet ; and pleaded another judgment for 60*l.* in the same Court, at the suit of John Githens : and pleaded divers other former recoveries in actions of debt in the same Court against the same* administrators, amounting in the whole to 514*l.* 8*d.* and that they have not goods or chattels of the intestate in their hands to be administered, *præterquam bona et catalla quæ (a) non attingunt ad valentiam præd' 514*l.* 8*d.* versus ipsos in forma præd' recuperat'* which are chargeable and liable to the said several executions. The plaintiff replied and said, that the said recovery of the said John Githens (b) *habita fuit per fraudem et covinam, &c. ad ipsum Edw. Turnor de debito suo præd' defraudand' et decipiend'*. upon which they were at issue to be tried by the country : and as to the said recovery of the said 100*l.* against the defendant, that the defendant after the death of the said Richard Booker, and after the said recovery, and before the purchase of the said original writ, 24 Feb. anno 4 reg. nunc, have paid to the said Thomas Billet 60*l.* parcel of the said 100*l.* recovered by him as is aforesaid, in full satisfaction and discharge of the said judgment, with which payment the said Thomas Billet held, and yet holds himself contented and satisfied, and then and there offered, and yet offers to release the said Edward Lawrence, &c. the said 700*l.*, or to acknowledge satisfaction thereof in the said Court of our Lord the King at Chichester, at the charge of the said administrators : but the said Edward, &c. deceitfully, and to the intent to (c) defraud and deceive the said Edward Turnor *executorem de justo debito suo, cognitionem satisfactionis, de præd' centum libris, &c. Sive de iudicio præd' relaxari, &c. distulerunt et adhuc differunt et iudicium præd' inde in suo robore et vigore permanere sinunt ad intentionem prædictam* (A).*

(A) These words, " that defendant defers " procuring acknowledgment of satisfaction " with the intent to defraud, are the material part of the replication ; " and it seems the payment of the money in satisfaction is only inducement, and not traversable, *Feale v. Gatesdon*, W. Jones 92. 5th Resolution, *Beaumont's case*, Latch. 111. Anon. Hil. T. 1 Car. B. R. cited arg. by Hardres, Hard. 70. And the defendant is bound to traverse the fraud, *Parker v. Atfield*, 1 Ld. Raym. 678. S. C. incorrectly reported, 12 Mod. 527. : but he is not bound to traverse severally that each particular judgment pleaded was kept on foot by fraud, but may traverse generally

that all or any of the judgments were kept on foot by fraud ; and this general form of pleading can be of no disadvantage to the plaintiff, for he may take issue that all were continued by fraud ; and if it should appear upon the trial that one of them alone had been kept, &c. by fraud, the plaintiff would be entitled to recover because the plea would be false in part ; or the plaintiff may single out one of the judgments and take issue on that alone, *Beake v. Kent*, Carth. 195. S. C. 4 Mod. 64. S. C. Holt 455. S. C. 1 Show. 289. Vid. Serjt. Williams' note (9). *Hancock v. Prowd*, 1 Saund. 334.

And made the like replication to the other recoveries : where-
upon the defendant demurred in law ; and the point in law
was, when a judgment is given against an administrator or
executor, for a just debt, due by the intestate or testator, if
the said subsequent agreement, as is before alleged, shall avail
the plaintiff or not ? and it was objected, that forasmuch as the
judgment was obtained *bona fide* for a just and true debt, the
subsequent agreement cannot make the recovery covinous,
and so long as it remains in force, unless the executors have
goods and chattels in their hands above that judgment, they
are not bound by law to pay any other debt, and covin can-
not be alleged in doing of a lawful act (B) ; as in a writ of
dower (a) against a disseisor, if the tenant pleads in abate-
ment of the writ an entry by the disseisee, the demandant
shall not be received to aver the entry to be by covin to abate
his writ, because the entry is congeable and lawful, and mixt
with no wrong, as it is held in 15 Edw. 4. 4 b. but if a woman
has lawful title (b) of dower, and causes another to disseise
the tenant against whom she recovers upon a good title, it
shall not bind the disseisee, *as it is held in 44 Edw. 3.
45 b. The same law of him who is put to his *Formedon*,
or any other real action : and the reason is, because the
demandant's right is mixed by covin with a tort, which is
an ill herb, and makes the whole act tortious. *Vide* 25 Ass.
pl. 1. 22 Ass. pl. 92. 27 Ass. pl. 74. 41 Ass. pl. 28. 44
58 a. 44 E. 3. 45 b. 46 a. Co. Lit. 35 a. 357 b. 1 Siderf. 21. Lane 44. 1 Roll. 549. 2 Roll.
Rep. 17. Perk. sect. 396. 44 Ass. 29. 18 H. 8. 5 a. Vin. Ab. Covin A.

2 Sand. 49.

See Rep. Q. A:
146.(a) Plow. 43 b.
44 a. 48 a. Br.
Collusion 20.
Vin. Ab. Covin
B.(b) Plow. 51 a.
Fitz. Dower 42.
Br. Dower 15.
[* 133 a.]
Br Fauxifier
de Recovery 6.
Br. Collusion
10. Plowd 54
b. 3 Co. 78 a.
5 Co. 31 a. 11
Ed. 4. 2 a. 6 Co.

(a) If judgment is recovered against an
executor upon covin, but for a good cause,
the creditor cannot avoid the recovery by
pleading that it was by covin to defraud
him ; because the party had good cause ;
and where a recovery is upon legal cause, it
cannot be called covinous ; although it was
with consent, and to the intent to prevent
another of his debt, *Veale v. Gatesdon*, W.
Jones 92. 3d. Resolution, *Blundivell v.*
Loverdell, 1 Sid. 21. *Williams v. Fowler*, 1
Strange 410. ; and such recovery will be good
although by confession pending a suit
by another creditor, and although no pro-
cess had been sued out in the action upon
which the judgment was confessed, *Mack-*
reth v. Jackson, 1 M. and S. 408. *innotis*.

The judgment must be confessed to the
creditor, and cannot be confessed to a
stranger, and must be confined to the a-
mount of his debt. A judgment confessed
by an executor to a creditor of the tes-
tator, as well for his own debt as in trust
for the debts of many of the creditors, can-
not be pleaded in bar to an action brought
against him by another creditor of the tes-
tator, *Tolput v. Wells*, 1 M. and S. 395.

An executor may plead *puis darrein con-*
tinuance such judgment recovered against

him in suits commenced since he pleaded
the general issue in bar in the principal case.
Pince v. Nicholson, 5 Taunt. 665. S. C. 1
Marsh. 280. And where in fact such a judg-
ment is obtained against executors before
the last continuance, although by fiction of
law the judgment may relate to a time
prior to the last continuance, the executors
may, by apt pleading, avail themselves of
such recovery by a plea *puis darrein con-*
tinuance, *Littleton v. Cross*, 3 Barn. and Cress.
317. S. C. 5 Dow. and Ryl. 175.

In *Holbird v. Anderson*, 5 T. R. 235. a
debtor on the day on which a judgment
creditor A. was entitled to execution con-
fessed a judgment to another creditor B.
for a just debt, who sued out execution be-
fore A.'s execution reached the sheriff's of-
fice ; and it was held that the preference
given was not unlawful nor fraudulent with-
in stat. 13 Eliz. c. 5. s. 2. for it was for a
just debt, and not for the defendant's benefit.
And in *Pickstock v. Lyster*, 3 M. and S. 371.
where a debtor, for the purpose of defeating
an impending execution made an assignment
to a trustee for the benefit of all his credi-
tors ; such assignment was held good and
not fraudulent within stat. 13 Eliz. c. 5.

Judgment for the plaintiff.
(a) Bridgm. 80.
(b) 5 Co. 27 b.

(c) Cart. 127.
Touch. 476.

(d) Cart. 134.

(e) 3 Bulstr.
110.

(f) 1 Jones 91,
92.

2. The recovery pleaded in the Court of Chichester insufficient.

(g) Poph. 99,
100. Cr. El. 383.

384. Jenk. Cent. 261. Goldsb. 176, 177. Co. Lit. 209 b. Moor 708, 709. 1 Roll. 421. Hob. 72. 3 Lev. 141. † 6 Mod. 72. (h) Vaugh. 93, 94. 1 Jones 451. Cro. El. 489. Cro. Jac. 184, 493. 532. Cro. Car. 46. Yelv. 46.

(c) In actions in inferior courts it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction. Serjeant Williams' note (1.) *Peacock v. Bell*, 1 Saund. 74 a. And the omission is error even after verdict, *Trevor v. Wall*, 1 T. R. 153. But as to such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remain, it is

Ass. pl. 29. 11 Hen. 4. 60, 61. 15 Ed. 4. 4 b. 11 Ed. 4. 2. 7 H. 7. 11. 1 H. 8. 5. 19 H. 8. 13. But it was answered and resolved, and so adjudged, that the plaintiff should (a) recover; for an executor or administrator ought to execute his office, and administer the goods of the deceased (b) lawfully, truly, and diligently: lawfully, in paying of all duties, debts and legacies, in such precedency and order as they ought to be paid by the law: truly, to (c) convert nothing to his own use; for an executor or administrator hath not the deceased's goods to his own use, but in another (d) right, and to another use, and ought not, by any practice or device, to bar or hinder any creditor of his debts, but ought truly to execute his office, according to the trust which is reposed in him: diligently, *quia* (e) *negligentia semper habet comitem infortunium*. Then in the case at bar, when the administrator compounds with one who has a judgment of 100*l.* for 60*l.* and the plaintiff offers to (f) release or to acknowledge satisfaction, and they defer it, to the intent that the judgment may stand in force, by which the plaintiff will be defrauded of his true debt, and the administrators convert the deceased's goods to their private use, which is altogether against their office and the trust reposed in them; and therefore be such agreement either precedent before the recovery or subsequent after the recovery, it is all one as to the creditor who is a third person, for he is defrauded as well by the subsequent agreement as by the agreement precedent, and thereby the administrators against their office and the trust reposed in them would make a private gain, where they ought not, and the creditor, who is a stranger, would lose his debt, which is by the law due to him: and an agreement between two shall not hurt or prejudice a third person. And (g) Goodale's case, in the Fifth Part of my Reports, fol. 95. was cited and well applied to this case. And if any prejudice accrues to the administrators in this case, it is their own fault, for Billet the plaintiff would have released to them or acknowledged satisfaction, but they deferred it, to the end by this means to bar the plaintiff of his just and true debt. 2. It was resolved, that the bar as to all the recovery pleaded in the court of Chichester was insufficient, for the validity of the said recovery was all the life and force of the bar: and, 1. It doth not appear that the Mayor had jurisdiction† or power (h) to hold a court, either by prescription or patent (c).

not necessary to lay them within the jurisdiction. Serjeant Williams' note, *ub. sup.* and the cases cited there. And where a party justifies under process of an inferior Court, it is necessary to set forth in his plea, that the cause of action arose within the jurisdiction of the Court. *Evans v. Muntley*, 4 Taunt. 49. Vid. Com. Dig. Courts, P. 6. Vin. Ab. Courts, L. a.

2. It appears by the declaration in the said court, that the action of debt was brought for 100*l.* without making mention of any bond, and therefore it ought not to be intended, that there was any bond, and then the said administrators were not chargeable in an action of debt (n) with a simple (a) contract, *and although the defendant in his bar doth confess that the debt was due by bond, yet that will not make the declaration good; for when the declaration wants (b) circumstance of time or place, &c. it may be made good by the bar: but when a declaration, bar, or replication, &c. wants (c) substance, it cannot be made good by the other's plea (e). And so you will better understand your books in 18 Ed. 4. 16 b. 22 E. 4. 2 b. 6 E. 4. 2. 11 H. 7. 24. 6 H. 7. 6. 10. 5 H. 7. 12. 38 H. 6. 17, 18, 19. 18 E. 3. 30. 38 E. 3. 34 b. Piow. Com. 229. Vide F. N. B. 21. 3. It was resolved, that in the case at bar, if the (d) replication had been insufficient, *scil.* that the said agreement subsequent should not avail the plaintiff; yet upon the whole record the plaintiff should have judgment, because the bar was insufficient in matter: and a difference was taken, when by the replication it appears that the plaintiff has no cause of action, there the plaintiff shall never have judgment, although the bar be insufficient; as in debt on a bond, with condition to perform (e) covenants in an indenture; the defendant pleads performance of all the covenants generally, where it appears that divers of them are in the negative or disjunctive, and so the plea in the general affirmative is insufficient (f): yet if the plaintiff replies, and shews a breach of one of the covenants, which on his own shewing is no breach; upon which the defendant demurs, judgment shall be given against the plaintiff, because upon the whole (f) record, it appears that the plaintiff has no cause of action; for the bond is indorsed with condition to perform the covenants, so that the plaintiff has no cause of action until there be a breach of

(a) Antea 126 n. Hard. 303. Yelv. 20. Vaugh. 93, 94, 95. 5 Co. 82 b. [* 133 b.] 9 Co. 86 b. 87 a. Cro. El. 121, 409. Noy. 53. Poph. 32. Swinb. 328, 329. 1 And. 182, 183. 1 Leon. 165. Mo. 366. 1 Sid. 333. Goldsb. 106, 107.

When, by the replication, it appears that the plaintiff has no cause of action, he shall not have judgment, although the bar be insufficient: but where the defendant's bar is insufficient in substance, and the plaintiff in his replication shews no matter against himself, the Court shall adjudge upon the whole record, and judgment shall be given for the plaintiff.

(b) Co. Lit. 303 b. Doct. pl. 69. 7 Co. 25 a. (c) Cro. Car. 209. Co. Lit. 303 b. Doct. pl. 69. 7 Co. 25 a. (d) Cr. Jac. 221, 133. Cro. Car. 6. Doct. pl. 70, 325. Lit. Rep. 130, 172. Mo. 464. 1 Sid. 336. Dy. 39. pl. 62. Antea 120 b. 9 Co. 53 a. 110 b. Godb. 138. 1 Lev. 195. Hob. 14. Yelv. 152, 153. Palm. 287. Winch. 37. (e) Cro. El. 232. Cro. Jac. 560. Cro. Car. 422. Co. Lit. 303 b. 2 Roll. Rep. 159. Hob. 14. (f) Postea 163 a. 3 Co. 52 b. 1 Sand. 285. Hob. 199. Cro. Jac. 133, 221, 312. Hard. 32. 2 Bulstr. 94. Styl. 354. Palm. 287. Lit. Rep. 172.

good.

(b) In *Williams v. Fowler*, Strange 410. Eyre J. observed, that though the judgment pleaded were erroneous, it might be a bar; for all that we (the Court) have to look to is to see it is not fraudulent; and in *Prince v. Nicholson*, 5 Taunt. 665. S. C. 1 Marsh. the judgments pleaded were in debt on simple contract; and it was urged that as debt did not lie on a simple contract against an executor, the judgments were erroneous, and could not be pleaded: but the Court adopted the authority of *Edgewood v. Dee*, Vaughan 89. and other cases cited to shew, that unless an executor avail himself of the objection in the first instance by demurring, he could not make use of the objection at any subsequent time, and held the plea

(a) Vid. note (c), Butts' case, *ante*, p. 102.

(f) Where a negative covenant is solely in affirmance of a precedent affirmative covenant, performance generally is a good plea, *Laughwell v. Palmer*, 1 Sid. 87.; and where the negative covenants are against law, and the affirmative according to law, the covenantee may plead generally that he has performed all, and the Court will take notice that the negative covenants are void and against law, 2d Res. *Norton v. Syme*, Moore 856. Vid. Com. Dig. Pleader 2 V. 13 E. 26. and Serjeant Williams' note (1) *Cutler v. Southern*, 1 Saund. 116. Bac. Ab. Pleas, and Pleading, I. 3.

(a) Cro. Jac.
133. Cro. Car. 5.
Poph. 42. Antea
120 b. 9 Co.
110 b. Doct. pl.
70, 325. Lit.
Rep. 341. Godb.
138. Palm. 287.
Winch. 37.
Fitzgib. 205.

9 Co. 110 b.

(b) Hob. 14.
Plow. 66 b.
7 Ed. 4. 31 a. b.
Fitz. Judgm.
50. Moor 105. Dyer 119. pl. 6. 1 And. 168.

covenant; and on the plaintiff's own shewing there is not any breach which is sufficient in law to give the plaintiff cause of action; and it shall be always intended, that every man will shew the best of his case: but when the defendant's (a) bar is insufficient in substance, and the plaintiff replies, and shews the truth of his case, whereby he shews no matter against himself, but matter explanatory, or perhaps not material, there the Court shall adjudge upon the whole record, and (the declaration being good) for the insufficiency of the bar, without any regard to the replication, judgment shall be given for the plaintiff: as if a man pleads a grant by letters patent in bar, which are not sufficient, the plaintiff, by replication, shews another clause in the said letters patent, which clause is not material, and the defendant demurs in law, in this case judgment shall be given against the defendant, *et sic in similibus*. And so you will better understand your books in 7 E. 4. 28. Tilly (b) and Woody's case, 11 H. 7. 28. and the books aforesaid; and other books vouched in Dr. Bonham's case.

[134 a.]

MARY SHIPLEY'S CASE,

Pasch. 8 Jacobi 1.

SHIPLEY
v.
BEANE.
Pt. VIII. 134 b.

On *plene administravit* pleaded by an executor, the plaintiff may immediately take judgment of assets *quando acciderint*.

TRINITY, 4 Jacobi Rot. 28. in the King's Bench, Mary Shipley brought an action of debt on a bond of 200*l.* against Christopher Beane and Ann his wife, executrix of Francis Hasilwood the obligor; the defendants pleaded fully administered, and so nothing in their hands. The plaintiff replied, that they had assets. The jurors found assets to the value of 172*l.* and judgment was given to recover the (a) whole debt of 200*l.* and damages and costs of the goods of the testator, *si*, &c. (b) *et si non, tunc* the damages of their own proper goods. Upon a writ of Error brought upon the same judgment in the Exchequer-chamber, the said judgment was affirmed, *Hil.* 7 Jac. For upon the bar, the effect of which is, nothing in their hand, the plaintiff might have prayed her (c) judgment pre-

(a) Touch. 495.
Allen 37, 38.
Styles 88.
1 Vent. 94. 9 H.
7. 15 a. Rast.
Ent. 328 b.
Cro. Eliz. 592.
Cr. Car. 167.
373. 1 Roll 929.
1 Leon. 68.

(b) Cro. Jac. 647, 648. Palm. 314. Dyer 185. pl. 67. 1 Roll. 928, 932. Noy. 120. 2 E. 4. 4 a. 7 E. 4. 9 a. Kelw. 61 a. 11 H. 4. 5 a. Br. Exec. 51. Fitz. Judg. 68. (c) Hob. 199. 1 Sid. 448. 2 Sand. 226. Office Exec. 274. Co. Lit. 366 a. Moor. 246. Swinb. 329. Cr. El. 592, 687. 1 Vent. 94, 95, 96.

sently (A); for thereby he confesses the debt, but that he cannot have execution until the defendants have goods of the deceased; as in a writ of (a) *mesne*, if the defendant pleads, not distrained in his default, he may pray judgment presently, for this plea will serve him only to save him from damages. *Vide* 11 H. 4. 52 a. So in a (b) *Warrantia Chartæ* against the heir, the defendant pleads nothing by descent, &c. the plaintiff shall thereupon recover *pro loco et tempore*. So in debt against (c) the heir, if he pleads nothing by descent, the plaintiff may have judgment presently, and a *Scire facias* *when assets descend (n). *Vide* *Old N. B. in Warrantia Chartæ et* 21 (d) Ed. 3. 9 b. Br. tit. *Warrantia Chartæ* 30. But the trial (Verdict) in the case at bar, is a good direction to the Sheriff what he is to do; but yet that doth not alter the judgment of the law; and it is the better form, and more agreeable to law, to have judgment for the whole (c), than for part of the debt, according to (e) the assets found. *Vide* Sym's case before for this matter.

(a) Co. Lit. 100 a. Hob. 39, 217. Br. Mesne 5. Fitz. Mesne 23. (b) F.N.B. 134. K. 1 Vent. 94. Noy. 149. Hob. 39, 199, 217. Co. Lit. 266 a. [* 134 b.] (c) Vent. 95, 96. Dyer 373. pl. 14. 2 Ld. Ray. 783. (d) Antea 52 b Plowd. 440 a. b (e) Co. Lit. 366 b. Antea, 53, 54.

(A) In *Dorchester v. Webb*, Cro. Car. 373. the Court denied the law to be as in Shipley's case, that if an executor pleads *plene administravit*, the plaintiff may pray judgment against him when assets come to him; and in *Noell v. Nelson*, 2 Saund. 226. Twisden, J. adopts their opinion. However such

judgment was given in *Noell v. Nelson*, and affirmed in *Dom. Proc. Vid. Acc. Com. Dig. Pleader*, 2 D. 9. 2 E. 4.

(B) Vid. note (a), *Harbert's case*, Vol. II. p. 31.

(c) Vid. Serjeant Williams' note (10) *Hancock v. Prowd*, 1 Saund. 336.

SIR JOHN NEDHAM'S CASE,

[135 a.]

Pasch. 8 Jacobi I.

In the Common Pleas.

Resolved, 1. Administration granted by the archbishop, when there are *bona notabilia* only in one diocese, is not void, but voidable. 2. If, after such administration granted, administration be granted by the ordinary of the diocese in which the *bona notabilia* are, and then the first administration is repealed, the second administration stands good. 3. In such case, administration of the effects of the obligee granted by the archbishop to the obligor does not extinguish the debt, but the second administrator may well sue: but if the obligee makes the obligor his executor, it is a release in law of the debt.

So if a woman obligee marries the obligor, or one of the obligors, it is a release in law.

But feme executrix marrying the debtor, is no release in law.

POST
v.
NEDHAM.
P.VIII.—135a.

Carthew 512.
Rep. 9. A. 41.
Swinb. 355, 357.

ARTHUR POST, and Catharine his wife, administratrix of Eliz. Weldish, brought an action of debt against Sir John Nedham, (which plea began *Mich. 7 Jacobi, Rot. 332.*) on bond of 200l. made to the said Elizabeth. *Cui quidem Kath' administratio omnium et singulorum bonorum. &c. quæ fuer' præfat' Eliz. tempore mortis suæ per Willihel' permissione divina Rossens' Episcopum apud Rossen' post Mortem præd' Eliz. commissæ fuit 5 Febr', 1605.* The defendant pleaded, *quod post mortem dictæ Eliz. et ante commissionem administrationis, præd' scilicet, 13 Maii 1604.*; the Dean and Chapter of Canterbury being guardians of the spiritualties (a) *sede vacante* of the archbishop of Canterbury, committed administration of the goods, &c. of the said Elizabeth to the defendant, *eo quod eadem Eliz. tempore mortis suæ habuit bona notabilia in divers' dioces' provincie Cant'*, which administration committed by the said dean, &c. doth yet remain in force, and demanded judgment if the action. The plaintiff replied, that after the said administration granted by the said dean, &c. to the defendant, and before the purchase of this original writ, *scil. 4 Nov. 1607*, before Dr. Bennet, commissary of the Prerogative Court of Canterbury, at the suit of the said Catharine, against the said defendant, the administration granted to the defendant was pronounced and declared *pro nulla et invalida ad omnem juris effectum*: upon which the defendant demurred in law. And in this case three points were resolved. Forasmuch as the defendant has not shewed in his

(a) Swinb. 355,
357.

1st Resolution.

(b) Swinb. 355,
357.

(c) Cr. El. 283,
457. Hob. 185.
Swinb. 355.
1 Roll. Rep.
[* 135 b.]
423.

(d) Swinb. 357.
Moor 145.
5 Co. 30 a.
2 Jones 78.
3 Bulst. 176.
Dav. 44 a. 47 a.
4 Leon. 212.
(e) Cr. El. 283,
457. Hob. 185.
Swinb. 355.
Moor 693.
1 Roll. Rep. 423.

2d Resolution.

(f) Plow. 281
a.

(g) 2 Co. 55 b.
4 Co. 2 b. 90 a.
Cro. Eliz. 585.
Co. Lit. 35 a.
10 Co. 62 a.
Hutt. 51. Dav.

32 a. Cawly 214.
2 Bulst. 304, 305. 3 Bulst. 192.

pl. 46. 1 Sid. 21.
p. 60.

bar, that the intestate had *bona notabilia* in (b) certain, for this cause it shall be taken that the administration was granted where the intestate had not *bona notabilia* in several dioceses: but yet it was agreed, that such administration was not void, (c) but voidable (A), as it was adjudged in (d) Hugh Vere's case, as appears in the Fifth Part of my Reports, fol. 29 & 30. *2. It was objected, that forasmuch as the administration granted to the defendant was not void, but (e) voidable, so long as it was in force, the inferior ordinary ought not to have committed administration, for the prerogative administration, granted by the archbishop, and the administration granted by the inferior ordinary cannot (f) stand and be both of effect together; for thereupon confusion will ensue; and, therefore, the administration granted by the inferior ordinary was utterly void; and although the said prerogative administration be afterwards revoked, that shall not make the other administration of any better effect than it was at the time it was granted, *quia (g) quod in initio non valet, tractu temporis non convalescit.* But it was answered and resolved, that now inasmuch as the ecclesiastical Judge has pronounced and declared the letters of administration granted to the defendant *pro nulla et invalida ad omnem juris effectum*, we must give credit to them, that it was for causes not appearing to us void *ab initio, vide* 17 Eliz. Dyer (h) 339, the like judgment upon the same reason (B). Also the (A) 3 Co. 78 b. 9 Co. 19 a. Dyer 339.

(A) Vide note (c) *Prince's case*, Vol. III.

(B) In all cases where the first administration is repealed, the second stands good,

administration is but an authority, because he has nothing to his (a) own use, but all to the use of another, and an authority may expect and commence *in futuro*, and therefore it shall be suspended until the other be repealed or declared void. And it was said, that there are *tria genera executorum*, *primus a lege constitutus, et ideo dicitur legitimus, ut Episcopus; secundus a testatore constitutus, et ideo dicitur testamentarius, ut executor; tertius ab Episcopo constitutus, et ideo dicitur dativus, ut administrator.* And it is to be observed, that the bishop who is executor, appointed by the law, is not permitted by the law to make a release of any debt (b) or gift of any goods; for he has a special property in the deceased's goods for the benefit of the dead, and nothing to his own use; and it appears in 9 Eliz. Dyer 255. that the ordinary has not (c) power to give authority to another to sell the deceased's goods, because he himself has no such authority, and the statute of West. 2. cap. 10. (d) *Bona deven' ad manus ordinarii disponenda*, that is, for the good of the deceased, and as to this purpose he is like an administrator, *duran' (e) min' ætate*, who has a special power committed to him to dispose of the deceased's goods for his benefit, and nothing in prejudice of the executor, as it is held in Prince's case, in the Fifth Part of my Reports, 29 b. So the lord who takes a surrender of lands held by copy of court roll, to the use of another, has power (f) only to grant it according to the use of the surrender, and not to any stranger as it is held in the Fourth Part of my Reports in Westwick's case. *Vide* 7 Hen. 4. 18 b. the (g) ordinary shall not have an action of trespass for carrying away the goods before an actual possession of them, (as executors or administrators may have) (c), but before possession the ordinary shall sue for them in the Spiritual Court; and Fitzherbert in abridging the case, tit. *Trespasse* 97. *ex hoc *sequitur*, that the ordinary shall not have an action of debt (h), as ordinary. 3. It was resolved, that the committing of (i) administration by the archbishop to the obligor, shall not extinguish the debt, but the debt remains (n); but if the obligee makes the obligor his executor, it is a release in law of the debt, for it is the act of the obligee himself (e), and therewith agrees 8 Ed. 4. 3 a. (i) 1 Siderf. 79. 1 Leon. 90, 91. 1 Roll. 934. Swinb. 325, 300, 301. Salk. 303. 1 Salk. 327. 3 Salk. 163.

(a) Antea 133 a. Cart. 134.

(b) 9 Co. 39 a. Swinb. 351. Co. Lit. 292 a.

(c) 5 Co. 31 a. 9 Co. 39 a. 1 Roll. 918. Swinb. 351. 352. Dyer 355, 336. pl. 8. 1 Keb. 854. Wentw. 250. 2 Inst. 398. Kelw. 81 a. b. (d) West. 2. c. 19. 2 Inst. 397. (e) 5 Co. 76 b. Cro. El. 678. 679, 718, 719. 2 And. 132. Raym. 484. Swinb. 288. 3 Leon. 278. March 138. 2 Inst. 398. Owen 35. Dall. 85.

[*136 a.]

3d Resolution.

(f) Co. Lit. 59 b.

(g) F.N.B. 120 d. Br. Tres. 83. Br. Jurisdict. 23. Br. Ord. 5.

(h) 1 Roll. 906.

(i) 1 Salk. 327.

though granted after the grant of the first, and before the repeal of it. Com. Dig. Administrator, B. 3. citing 2 Brownl. 119. *Charnock v. Curry*.

(c) Vide note (c) *Middleton's case*, Vol. III. p. 55.

(d) So the making a debtor executor *durante minoritate* is no discharge of the debt, since he is only executor in trust for the infant, till he comes of age. *Coweth v. Philip*, 1 Ld. Raym. 605. Vin. Ab. Executors, H. b. pl. 20.

(e) The principle upon which the appointment is held in law to be a release

seems to be that a debt is merely a right to recover the amount by way of action; and as an executor cannot maintain an action against himself, his appointment by the creditor to that office discharges the legal remedy for the debt. *Simmons v. Gutteridge*, 13 Ves. 264. *Woodward v. Lord Darcy*, Plowd. 186. Com. Dig. Admon. B. 5. note 1. Co. Litt. 244 b. So if the testator make one debtor his executor, where several are jointly bound or indebted to him, it is a release to all. *Wankford v. Wankford*, 1 Salk. 300. So also if the bond be *joint and several*, *Chectham v. Ward*, 1 Bos. and Pull. 630.

If a woman obligee marries the obligor, or one of the obligors, it is a release in law. But feme executrix marrying the debtor is no release in law.

(a) 1 Brownl. 76. Cr. Car. 313, 373. Co. Lit. 264 b. 1 Roll. 934. Plowd. 184 b. 186 a. Hob. 10. Cr. Car. 373. Wentw. 45. Yelv. 160. Moor 236, 855. 1 Jones 345. Hutt. 128.

1 Roll. 940. Br. Execu. 112. 8 E. 4. 3 a. Swinb. 300, 301. Hutt. 17. (b) 1 Roll. 934, 940. Hob. 10. Co. Lit. 264 b. (c) Cr. El. 114, 150. 1 Roll. 934, 935. Co. Lit. 264 b. Moor 236. 1 Leon. 320. (d) 20 H. 7. 5 a. 3 Inst. 202.

21 E. 4. 2 b., &c. in the same manner as if a woman (a) obligee marries the obligor, or one of the obligors, it is a release in the law of the debt, for it is by the act of the obligee herself, and therewith agree 11 H. 7. 4. and 21 Hen. 7. 29. But if a woman (b) executrix marries the debtor, it is no release in law, because she has the debt in another right; and if it should amount to a release in law, it would amount to a *Devastavit*, which is a wrong, which the law will not suffer. And so it was adjudged in the King's Bench, Mich. 30 & 31 Eliz. where in debt against a woman (c) executrix, she pleaded fully administered; and it was found that the defendant had married the obligor, and that the husband was dead; and it was adjudged to be no release in law, nor the debt extinct, but only suspended during the coverture, and so a difference. Note, that Fleta, lib. 2. cap. *De Testamentis*, says, *De bonis defuncti trina debet esse depositio*. 1. *Necessitatis ut (d) funeralia*. 2. *Utilitatis*, that every one shall be paid in such precedency as he ought to be. 3. *Voluntatis*, as legacies, &c.

And upon the death of the executor, debtor, the surviving executors cannot sue his representative for the debt, for a personal thing suspended is extinct. Com. Dig. Admon. B. 5. Nor is the case varied by the executor's dying without having proved the will, or having administered. Com. Dig. ib. Toller's Exors. 348. Bac. Ab. Exors. and Admors. A. 10. Or even by his refusal to act with his co-executors, unless he formally renounced the office in the spiritual court. Such a renunciation, indeed, shall prevent the release of his debt; for he could no more be compelled to accept a release, than a deed of grant. *Wankford v. Wankford*, 1 Salk. 307.; and the debt is released, although the testator was within age. Co. Lit.

264 b.

But although the action be released, the debt shall be assets in the hands of the debtor executor. Com. Dig. Admon. B. 5. Assets C. Bac. Ab. Exors. and Admors. A. 10. Vin. Ab. Executors, H. b.; for it must be taken that he has received so much money; and if he does not administer so much, it is a *devastavit*, *Wankford v. Wankford*, 1 Salk. 306.

In equity, when the debtor is appointed executor, a trust is raised not only for a residuary legatee, *Brown v. Selwin*, For. 240. but even for the next of kin, *Carey v. Goodinge*, 3 Bro. C. C. 110. *Berry v. Usher*, 11 Ves. 90. And vid. *Simmons v. Gutteridge*, 13 Ves. 261.

SIR FRANCIS BARRINGTON'S CASE. [136 b.]

Pasch. 8 Jacobi 1.

In the Common Pleas.

Resolved, 1. By a grant to one and his heirs of all woods, underwoods, &c. then growing, and of all timber trees, woods, &c. which thereafter should grow in a certain part of the forest of H., (except the land and soil of the same wood,) with liberty to enclose them for the preservation of the spring of wood, &c. as by the laws and statutes of the realm is appointed, &c. without any interruption by the grantor, &c.; the grantee has an inheritance in fee, as a profit *apprender in alieno solo*, and the soil remains to the grantor. 2. The stat. 22 E. 4. c. 7. which under certain circumstances authorises the proprietors of grounds in forests, after a felling, to enclose them, without the king's licence, for seven years, to preserve the springing wood, extends to the said grantee. 3. But does not extend to the wood of any subject, in which another has a right of common. 4. The commoners, as appears by the preamble, are not any of the parties between whom the act was made, and therefore their right is not taken away by it. 5. If the act had extended to wood in which others had a right of common, yet the woods could not be so enclosed as to exclude the commoners. 6. The stat. 35 H. 8. c. 17. which enacts "that it shall not be lawful to any persons which have or "shall have any woods wherein any ought to have any common, &c. "to fell and cut down the same woods, (except it be to his own use "and occupation,) until such time as the fourth part of the said ground "or soil, &c. be divided, &c. fenced and enclosed, &c." restrains the owner of the wood from felling his own wood, on a penalty, but does not exclude the commoner of his common. The words in the act, "except it be to his own proper use or occupation," exempt the owner from the penalty, and are to be intended of his necessary use, as to repair his house, or to burn in his house, &c. 7. The acts 22 E. 4. and 35 H. 8. are general acts. S. C. [2 Brownl. 289, 322. Godb. 167.] affirmed an error, *per tot. cur.* K. B. 1 Roll. Rep. 135.

CHALKE
v.
PETER.
P.VIII.—136 b.

BETWEEN Richard Chalke, plaintiff in replevin, and William Peter, and Nicholas White, defendants, which began Hil. 6 Jacobi, Rot. 157. on a long and impertinent pleading, the case was such; Sir Robert Rich, Lord Rich, was seised of the forest or chace of Hatfield (whereof the place where, &c. was parcel) in fee, and by his deed indented, bearing date 30 Jan. 19 Eliz. for good consideration granted to Sir Thomas Barrington, Knt. and his heirs, *omnes boscos arbores tam manem*

*subboscis et spinas quam alia genera quorumcunque, adtunc crescent' stant' et existent' simul cum omnibus arboribus, vocal' timber trees, boscis, subboscis, et spinis quibuscunque, quæ ad aliquod tempus extunc imposterum (A) forent crescent' stant' renovant' sive existent' in et super illis partibus forestæ præd' communiter vocal' Bushend quarter, et quarterium vocal' Takely quarter (except the land and soil of the same wood) with liberty to enclose them, and to hold them enclosed for the preservation of the spring of wood which should be for such time, as by the laws and statutes of the realm is appointed and enacted, and not otherwise absque molestatione seu interruptione of the said Lord Rich, his heirs or assigns, and to exclude the deer, and all other cattle, out of the wood so inclosed, and to have the herbage and feeding thereof, as any owner of the wood might do, by the laws and statutes of this realm, *without interruption of the said Lord Rich, his heirs or assigns. And that the plaintiff is seised of a house and six acres of land in Hatfield in fee, to which he has common appurtenant for all cattle levant and couchant, &c. in and through the whole forest or chase of Hatfield; which grant made by the Lord Rich, was in performance of an award made between the said Lord Rich, and Sir Thomas Barrington by the Lord Burghley Lord Treasurer of England, Thomas Earl of Sussex, Sir William Cordel, Master of the Rolls, and Sir Gilbert Gerrard, Attorney General, which arbitrament and grant was confirmed and established by (a) act of Parliament, anno 27 Eliz. with a † saving to all strangers, &c. And that the said Sir Thomas Barrington died, after whose decease the said wood descended to Sir Francis Barrington as to his son and heir, who, 1 Feb. 1 Jacobi, felled the wood in the place in which, &c. and took it to his own use, and 10 Mar. following inclosed it for the preservation of the spring, and so has maintained it, according to the laws and statutes of this realm: and the parties demurred in law: and if the plaintiff was barred of his common or not was the question. And in this case the defendants pleaded the said arbitrament, and the said act of Parliament at large; but to no purpose, for without question, neither the arbitrament nor the act (in respect of the saving) can bar the plaintiff of his common: but all the doubt of the case arises upon two acts of Parliament not pleaded, sc. the act of (b) 22 Edw. 4. c. 7. and the act of 35 Hen. 8. c. 17. And first it was objected, that the said act of 22 Edw. 4. has barred the plaintiff of his common; for by the said act it is enacted, that if any of the King's subjects having woods growing in his own ground within any forest, chase, or purlieu, &c. causes the same wood, or any part thereof to be felled by licence of the King, or his heirs, in his forests, chaces, or purlieus, or without licence, in the forest, chase, or purlieu, of any other person, or make sale of the same wood: be it lawful for the said subjects possessors of the same ground*

[* 157 a.]

(a) 2 Brown.
289, 323, 324,
425. Godb.
167, 168.
† 1 Jones 235.

(b) 2 Brown.
290, 322, 323,
324, 325, 326,
327, 328.
Godb. 167, 168,
169, 170, 171.
4 Inst. 304. 1
Roll. Rep. 92.
1 Jones 235.

(A) That there may be a grant or reservation as well of trees thereafter to grow on the soil as of the trees then growing, vide *Stanley v. White*, 14 East. 338, 339.

whereupon the wood grew, and to other persons to whom such wood shall be sold, immediately after the wood so felled, to coppice and enclose the same ground with sufficient hedges able to keep out all manner of beasts and cattle out of the same ground for the preservation of their young spring; and the same hedges so made the said subjects may keep continually by the space of seven years next after the same inclosing; and there is no saving in the act for the commoners; and therefore (as it was urged) they shall be excluded of their common during the seven years; for every one is party and privy to an act of Parliament, and the rights and interests of those which are not saved by the act of Parliament are bound: and the makers of the act have greater regard to the preservation of the spring of woods for the commonwealth* in maintenance of timber and woods, than to common in the woods of subjects within forest or chases after a reasonable time, till the spring be of such growth that beasts or cattle cannot hurt or hinder it. And these words, To enclose the same land with sufficient hedges able to exclude all manner of beasts or cattle out of the same ground, were strongly urged to prove the intent of the makers of the act to exclude not only the beasts of the forest, or chase, but also cattle of commoners; for beasts of the forest are not called cattle; and the words are, able to exclude all manner of beasts and cattle out of the same ground; which general words extend to beasts and cattle of the commoner.

[* 137 b.]

To which it was answered by the plaintiff's counsel:—1 That the said act of 22 Ed. 4. doth not extend to this case, because the statute extends only to those who are owners of the ground; for the words of the act in divers parts thereof are, growing on their proper ground, and in this case Sir Francis Barrington has but a profit apprender in another's ground, for the ground remains to the Lord Rich. 2. It was answered, that the stat. (a) 35 Hen. 8. cap. 17. which is in the negative, "That it shall not be lawful to any persons which have or shall have any woods wherein any ought to have any common, &c. to fell and cut down the same woods (except it be to his own use and occupation) until such time as the fourth part of the said ground or soil, &c. be divided, &c. fenced and inclosed, &c." *Et (b) leges posteriores, priores, contrarias abrogant.* To which it was answered by the defendant's counsel, that Sir Francis was out of this prohibition, and within the exception of this branch; for he has taken the said wood to his own use; and he who takes wood wherein others have common is out of the prohibition of this act. And now this term the case was argued at the Bench by the Judges; and in this case these points were resolved,—1. That Sir Francis Barrington has an (c) inheritance as profit apprender *in alieno solo*, and that the soil remains to the Lord Rich. 2. That the stat. of 22 Edw. 4. shall extend to Sir F. Barrington, notwithstanding he has not the soil; for the words are, that it be

(a) 35 H. 8. c. 17. 2 Brown. 290, 322, 323, 324, 325, 328. Godb. 167, 169, 171.

Resolutions of the Court. (b) 11 Co. 59 a. 62 b. 64 b. 1 Jones 186. 1 Co. 25 b. Cr. Jac. 121.

12 Co. 8. 2 Brownl. 324. Godb. 169. 2 Roll. Rep. 410, 423. Stanf. Prer. 69 b. 452. 2 Inst. 685. (c) 2 Brown. 324, 325. 11 Co. 49 b. 1 Roll. Rep. 96, 99, 137. Vin. Ab. Grants P 3. Com. Dig. Estate A.

3. Resolution.

[* 138 a.]

(a) 2 Brownl.
326. Godb. 170.
Com. Dig.
Chase N 7.
Manwood 381.

(6) 2 Brown.
326.

4. Resolution.

1 L. Ray. 421.

Prior of Castle-
acre

v.

Dean of St.
Stephens.

The act 1 Hen.
5. c. 7., which
gave the lands
of priors aliens
to the King,
did not extin-
guish an annu-
ity of the prior
of Castleacre,
which he had
out of a rec-
tory, parcel of
a priory alien;
though there

was not any saving in the act.

(c) 2 Brown. 326, 327. Godb. 170. 1 Jones 235, 236. Via. Ab.
Stat. D. pl. 5. † 1 H. c. 7. (d) 2 Brown. 323, 327. Godb. 168, 170. Moor 131, 132. Cr. El.
808. 2 Anders. 190, 191.

lawful for the said subjects possessors of the same soil, or to other persons to whom such wood shall be sold; and the said grant for the considerations in the said award mentioned to Sir Thomas Barrington and his heirs was a perpetual sale to him within the words and intention of the act. 3. The said act doth not extend to the wood of a subject, in which any other has common, but only to a several wood: for by the common law, he who has a wood in which another has common cannot inclose it to exclude *the commoner of his common, be it in forest or chase, or out of forest and chase. But he who has a several wood in a forest, may after the fall inclose it for three years *parvo fossato* (a) *et bassa haia secundum assisam forestæ*, as appears by the *Ad quod damnum* in the Register 457. Then it appears by the preamble of the said act, that it extends only to a several wood; for it recites, that where subjects have felled their woods, &c. they could not heretofore inclose their ground to preserve the germins longer than three years, which proves what the common law was before in such case: but without question that extends only to a several wood; for none could enclose a wood wherein another had common for a day, &c. But now this statute has enlarged the time to seven years, and has also raised the hedges; for where he might before enclose it *parvo fossato* (b) *et bassa haia*, he may now make *magnam et altam haiam*, sufficient to exclude all manner of beasts and cattle. 4. It appears by the preamble, between what persons, and for and against what persons, this act was made; and the parties to this great contract by act of parliament are the subjects having woods &c. within forests, chases, or purlieus of one part, and the King and other owners of forests, chases and purlieus of the other part; so that the commoners are not any of the parties between whom this act was made; and therefore the case well argued in 21 Hen. 7. 1 a. b. *inter* the Prior of (c) Castleacre, and the Dean of St. Stephens, and left at large in the printed Report, was afterwards adjudged, as appears by the record thereof, which began *Pasch.* 18 Hen. 7. Rot. 416. that the act of † 2 Hen. 5. being made between the King and Priors aliens, by which the priories aliens were given to the King, did not extinguish the annuity of the Prior of Castleacre which he had out of a rectory parcel of a priory alien, although there was not any saving in the act. And Mich. 25 and 26 Eliz. (d) Boswel's case, in *Curia Wardorum*, where it was resolved, that when an act makes any conveyance good against the King, or any other person or persons in certain, it shall not take away the right of any other, although there be not any saving in the act (e).

(s) It has always been held that a private act does not bind strangers, and that before the general practice of inserting a saving clause in every private act was adopted. In

Lucy v. Livingston, 1 Vent. 176. Lord Hale said, "Every man is so far party to a private act of Parliament as not to gainsay it: but not so as to give up his interest. It is

5. If the act had extended to wood in which others had common; yet the conclusion restrains the generality of the precedent words: for the statute doth not give an absolute and indefinite power to the owners of wood to inclose, &c. but to inclose the ground, to keep it enclosed, and to repair it, without (a) suing the King's licence, or other persons, or their officers of the same forests, chases, or purlieus, so that this conclusion limits the precedent words only against the King, and other owners of forests, chases, and purlieus; but no word in the whole act gives authority to them to enclose against any commoner. And where it was said, that this word *cattle* cannot be applied *to beasts of the forest; it was answered that they might fitly and properly be called beasts and cattle of the forest. And so it is said in the preamble of this very act, beasts and cattle of the forest. And it is to be known, that there are five manner of beasts of the forest, *sc.* hart, hind, hare, wild boar, and wolf (b); and five manner of beasts of chase, *sc.* buck, doe, fox, martin, and roe; and beasts and fowls of warren are, hare, coney, pheasant, and partridge (c). *Vide* Regist. 96. 43 E. 3. 13. 38 E. 3. 10. 3 H. 6. 12, 15. *Liber Intr.* Trespass in Hunting, 585. 12 H. 8. 9 b. (c) Holinshed's Chronicle 306. num. 30. 6. It was resolved, that the said clause of the act of 35 Hen. 8. in the negative, restrains only the owner of the wood from felling his own wood on a penalty; which without question doth not exclude the commoner of his common: and the said words (d) (*except it be to his own use or occupation*) serve to exclude the owner out of this penalty; and are to be intended of his own proper necessary use; as to repair his house, or to burn in his house, &c. Then there is another clause which prohibits the commoner *that after the said felling* (that is to say, after the division and felling, for the division of the fourth part ought to precede the felling) *in any such part, i. e. in the fourth part*, so divided, no beasts or cattle, during seven years, shall be suffered to feed there, upon penalty, &c. and the lord is excluded to feed with his cattle in the three parts during the seven years; and after the seven years (until a new felling, according to the act) the commoner shall have his common again. And it is to be observed, that by the statute of

5. Resolution.

(a) 2 Brown. 326.

[* 138 b.]
What beasts are beasts of the forest, &c.

(b) Co. Lit. 233 a. Com. Dig. Chase A. F.

(c) 2 Brown. 327.

6. Resolution.

(d) Hard. 258.

“ the great question in *Barrington's case*, 8 Co. The matter of the act there directs it “ to be between the foresters and the proprietors of the soil; and therefore it shall not “ extend to the commoners to take away the “ common. Suppose an act says, whereas “ there is a controversy concerning land between A. and B. it is enacted that A. shall enjoy it: this does not bind others, though “ there be no saving; because it was only intended to end the difference between two.”

In *Westly v. Kiernan*, Amb. 697. it was held that a private act would bar an estate tail and all remainders expectant thereon, and also the reversion, although the rights of the remaindermen were not excepted in

the saving clause. But where a tenant for life enters into an agreement to convey the fee simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life estate. *Provost of Eton v. Bishop of Winchester*, 3 Wils. 483. and vid. *Cru. Dig.* Vol. V. p. 9. *et seq.* 3d ed.

(c) Co. Lit. 233 a. names a roe to be a beast of warren; and *volucres campestris* as quails, rails, &c. *sylvestres*, as woodcock, &c. and *aquatiles*, as mallard, herne, &c. are named fowls of warren.

7. Resolution.

† West. 1. c. 20.

2 Inst. 198, 199.

(a) 2 Brownl.

222, 324, 325,

327. Godb.

168, 169, 171.

4 Co. 76 a. 77 a.

2 Roll. 465, 466.

Vin. Ab. Stat. C.

22 E. 4. the owner of the wood ought first to fell the wood, and after enclose, and by the statute of 35 Hen. 8. he ought first to enclose, and after within four months fell the wood.

7. It was resolved, that the statute of Westminster 2. † *De malefactoribus in parcis, charta de foresta*, (a) and these acts of 22 Ed. 3. and 35 Hen. 8. are general laws concerning all persons, whereof the Court *ex officio* ought to take notice; and *eo potius*, because this act of 22 Edw. 4. concerns the King.

8 Co. 28 a. Doct. pla. 336, 337. Yelv. 106. Hob. 310. Hale's Common Law 15. Com. Dig. Parl. R. 6. Bac. Ab. Stat. F.

[139 a.]

DR. DRURY'S CASE,

Pasch. 8 Jac. 1. Rot. 364².

In the Common Pleas.

Audita querela
brought by
O. B.
7 Jac. 1.
The writ.

Whereas J. D.
had recovered
in C. B. of the
said O. B. a
certain debt
and damages
and costs.

And whereas
the said O. for
that he did not
come into
Court to satisfy
the said J. his
debt, &c. was
outlawed, and
taken at the
suit of the said
J. by *capias*
utlagatum, and
imprisoned, and in execution for the debt and damages.

HERETOFORE as it appeareth in the term of the Holy Trinity, in the seventh year of the reign of the lord the now King of England, &c. and of Scotland the forty-second, in the 364² roll, it is contained thus, Surrey, ss. It was commanded to the Sheriff, that whereas of the grievous complaint of Owyn Bray of Cobham in the county aforesaid, Gent. to the lord the King, grievously complaining, it was shewed, that whereas John Drury, doctor of laws, in the Court of the lord the King, of the Bench here, that is to say, in the term of St. Michael, in the fifth year of the reign of the said lord the now King of England, before the Justices of the said lord the King, of the Bench aforesaid here, that is to say, at Westminster, by judgment of the said Court had recovered against the said Owyn, as well a certain debt of two hundred pounds, as thirty-three shillings and fourpence, which to the said John in the Court aforesaid, of the said lord the King here were adjudged for his damages which he had by occasion of the detaining of the said debt whereof he is convicted: and whereas also the said Owyn, for that he did not come into the said Court of the lord the King here, to satisfy the aforesaid John of the debt and damages aforesaid, was put in exigent in the county of the said lord the King of Sussex, to be outlawed, and on that occasion afterwards, that is to say, on the nineteenth day of May, in the sixth year of the reign of the lord the now King, was outlawed; and notwithstanding the said Owyn, in execution for the debt and damages aforesaid, by virtue of a certain

writ of the said lord the King of *Capias utlagatum* thereof to the late Sheriff of the aforesaid county of Surrey, by Herbert Morley, Esq. then Sheriff of the aforesaid county of Surrey, at the suit of the said John was taken, and imprisoned: and after he was so taken and imprisoned was by the said Sheriff out of *the same prison at large, where he would, freely and voluntarily suffered to go, and from the execution aforesaid was delivered, as the said Owyn by ways and means convenient was ready to shew; yet the aforesaid John sueth forth execution of the debt and damages aforesaid against him the said Owyn, by reason of the recovery aforesaid, and endeavoureth, and threateneth unjustly, him the said Owyn, to be taken and imprisoned, to his no small damage and grievance; whereupon he hath besought the Lord the King of a proper remedy for him to be provided. The said lord the King, willing what is just to be done to the said Owyn in this behalf, hath commanded to the Justices here, that the complaint of the said Owyn in this behalf being heard, and calling before them the parties aforesaid, and others which in this behalf they shall see fit to be called, and their reasons thereof here being heard; to the said Owyn full and speedy justice they should cause to be done in this behalf, which of right, and according to the law and custom of the kingdom of the lord the King of England should be done. And that they cause to come here at this day, that is to say, from the Holy Trinity in fifteen days, the aforesaid John, to answer, of and upon the premises, and further to do and receive what the Court of the said lord the King here shall consider in that behalf: and now here, at this day, come as well the aforesaid Owyn, by Otho Gayer his attorney, as the aforesaid John, by John Nye his attorney; and upon this the said Owyn saith, that whereas the aforesaid John, in the Court the said lord the now King here, that is to say, in the term of St. Michael, in the fifth year of the reign of the said lord the now King of England, &c. before Edward Coke, Knight, and his companions then Justices of the said lord the King of the same bench here, that is to say, at Westminster, by the consideration of the said Court, recovered against the said Owyn, as well the aforesaid debt of two hundred pounds, as the aforesaid thirty-three shillings and fourpence, which to the said John in the same Court of the said lord the King here was adjudged for his damages, which he had by occasion of detaining the same debt whereof he is convicted; and whereas also the said Owyn, for that he did not come into the same Court of the said lord the King here, to satisfy the said John of his debt and damages, he was put in exigent in the aforesaid county of Sussex to be outlawed, and on that occasion afterwards, that is to say, on the ninth day of May, in the sixth year of the reign of the lord the now King, was outlawed, upon the said outlawry, the aforesaid John Drury, afterwards, that is to say, in the term of the Holy Trinity, in the sixth year of the reign of the lord the now King abovesaid, sued forth out of the Court of the lord the King of the bench here, a certain writ of the said lord the King

[* 139 b.]

And was delivered by the sheriff of S. from the said execution, and suffered to go at large, yet the said J. sueth forth execution, &c.

The Declaration.

Whereas the said J. had recovered in C.B. of the said O., a certain debt, and damages, and costs.

And whereas the said O. for that he did not come into Court to satisfy the said J. his debt, &c. was outlawed; and taken at the suit of the said J. by writ of *capias utlagatum*, and imprisoned.

- [* 140 a.] of *Capias utlagatum* against him the said Owyn; then to the *Sheriff of the aforesaid county of S. directed, by which writ the said lord the King then commanded the said Sheriff of S. that he should not omit for any liberty within his county, but that he take the said Owyn outlawed in the said county of Sussex, the said 9th day of May, in the sixth year of the reign of the said lord the now King abovesaid, at the suit of John Drury, of the plea of debt, whereof he is convicted, &c. And him safely to keep, &c. so that he should have his body before the Justices of the said lord the King here on the morrow of All Souls then next coming, to do and receive what the Court of the said lord the King thereof should consider in that behalf; by virtue of which writ, the said Owyn afterwards, that is to say, on the seventh day of October, in the sixth year aforesaid, at Guildford, in the aforesaid county of Surry, by the aforesaid Robert Morley, then being Sheriff of the aforesaid county of Surry, was taken and imprisoned, and after he was so taken and imprisoned, the said Owyn by the said Sheriff the same day and year, &c. at Guildford aforesaid, out of that prison at large, where he would freely and voluntarily to go was suffered, and from the execution aforesaid was delivered: and this he is ready to verify: whereupon he prayeth judgment, and that the aforesaid John from having his execution aforesaid by colour of the judgment aforesaid may be barred, and that the said Owyn thereof be discharged, &c. And the aforesaid John prayeth licence thereof to imparl here, until in eight days of St. Michael, &c. and hath it, &c. And the same day is given to the aforesaid Owyn here, &c. at which day the plea aforesaid was adjourned, by writ of the lord the King of common adjournment here, until from the day of St. Michael, in one month then next following, at which day, here cometh as well the said Owyn, as the said John by their attorneyes aforesaid, and upon this, farther prayeth licence thereof to imparl here, &c. until from Easter day in fifteen days, and hath it, &c. And the same day is given to the said Owyn here, &c. at which day of fifteen days of Easter, come as well the aforesaid Owyn, as the aforesaid John by their attorneyes aforesaid, and upon this the said Owyn prayeth that the aforesaid John, to his writ and declaration aforesaid may answer: and the said John Drury saith, that he for any thing before alleged from having execution of his debt and damages against him the said Owyn, ought not to be barred or delayed, because he saith, that after the aforesaid time, when it is supposed the aforesaid Owyn out of the custody of the aforesaid Sheriff of Surry, to have escaped, and before any farther execution against the aforesaid Owyn, by him the said John, by reason of the judgment aforesaid, was sued forth and had, that is to say, in the term of St. Michael, in the sixth year of the reign of the said lord the now King abovesaid, out of the aforesaid Court of the said lord the now King, of the bench here, *upon the said outlawry (as is before said) pronounced, issued forth a certain writ of the said lord the King, of *Capias utlagatum*, against him the said Owyn, at the suit of the said John, then
- And afterwards was by the sheriff of S. suffered to go at large, and was delivered from the said execution.
- Imparllance.
- Adjournment.
- Farther Imparllance.
- Plea.
- After the time when it is supposed the said O. escaped out of the custody of the said sheriff of S. and before any further execution
- [* 140 b.] against the said O. by the said J. by reason, &c. to wit, the 6 Jac. 1.

to the Sheriff of the county of Middlesex directed; by which writ the lord the King commanded the aforesaid Sheriff of Middlesex, that he should not omit for any liberty of his county, but that he should take the said Owyn by the name of Owyn Bray, late of Cobham in the county of Surry, gent. outlawed in the aforesaid county of Sussex, the aforesaid 9th day of May, in the sixth year of the reign of the lord the now King abovesaid, at the suit of him the said John, by the name of John Drury, Doctor of Laws, of a plea of debt whereof he was convicted, if he should be found in his bailiwick; and him should safely keep, &c. so that he should have his body here, that is to say, at Westminster aforesaid, on the aforesaid morrow of All Souls, in the same term of St. Michael, in the year aforesaid, to do and receive what the Court of the said lord the King thereof should consider in that behalf: at which morrow of All Souls here, that is to say, at Westminster aforesaid, cometh the aforesaid Owyn, by William Brown then his attorney; and the Sheriffs, that is to say, George Bolles and Richard Farrington, then Sheriff of the aforesaid county of Middlesex, then here returned that the aforesaid Owyn was not found, &c. and upon this the said Owyn, then prayed *oyer* of the writ of *Exigent*, upon which the said Owyn, at the suit of the said John Drury aforesaid, in form aforesaid stood outlawed: and it was then read to him in these words, 'James by the grace of God, of England, Scotland, France, and Ireland, King, defender of the faith, &c. To the Sheriff of Sussex greeting: we command you that you put in *Exigent* Owyn Bray, late of Cobham in the county of Surry, gent. from county to county, until according to the law and custom of our kingdom of England he be outlawed, if he shall not appear; and if he shall appear, then that you him take, and cause safely to be kept so as you have his body before our Justices at Westminster, on the morrow of (the Holy) Trinity, to satisfy to John Drury, Doctor of Laws, as well of a certain debt of two hundred pounds, which the said John in our said Court, before our Justices at Westminster recovered against him, as of thirty-three shillings and fourpence, which to the said John, in our same Court were adjudged for his damages, which he had by occasion of the detaining the same debt, whereof he is convicted; and whereupon you returned to our Justices at Westminster, in eight days of St. Hilary, that the aforesaid Owyn is not found in your bailiwick, and have you there this writ. Witness Edward Coke at Westminster, the 25th day of January, in the fifth year of our reign of England, France, and Ireland, and of Scotland the forty-first.' Which being read and heard, the said Owyn said, that he of the outlawry aforesaid, ought not to be charged, because the said writ of *Exigent* had not any certain day of return, this word (Holy) between the words, morrow and Trinity, not having any signification, as by the writ aforesaid then it appeared; and for the same cause the said Owyn then prayed judgment, and that the outlawry aforesaid in form aforesaid pronounced and had,

Upon the said outlawry a *capias utlagatum* issued against the said O. at the suit of the said J. directed to the sheriffs of M.

Who returned *non est inventus*; upon this the said O. then prayed *oyer* of the writ of *Exigent*, which was read to him.

The said O. said, [* 141 a.] that he ought not to be charged, because the said writ had not any certain day of return.

Whereupon it was considered that the said O., by occasion of the said outlawry, should not be molested &c.; and the said I. saith there is not any such record of the outlawry aforesaid as the said O. by his writ and declaration supposeth, whereupon &c.

Demurrer.

Joinder.

Curia advisare vult.

be annulled, made void, and altogether holden for nought. Upon which, the writ aforesaid then being seen, and by the Justices here then fully understood, to the same Justices it then appeared, that the allegation of the aforesaid William Brown in discharge of the aforesaid Owyn of the outlawry aforesaid was true: therefore then it was considered in the said Court here, that the said Owyn, by occasion of the outlawry aforesaid, should not be molested or troubled, but should go thereof acquitted, &c. as by the record thereof in the said Court here remaining fully appeareth: and so the said John Drury saith, that there is not any such record of the outlawry aforesaid, as the said Owyn by his writ and declaration aforesaid above supposeth: and this he is ready to verify: whereupon he prayeth judgment, if he from having execution of his debt aforesaid and damages aforesaid against the aforesaid Owyn ought to be barred, &c. and the aforesaid Owyn saith, that the aforesaid plea of the aforesaid John in form aforesaid above pleaded is not sufficient in law for him the said John to have and maintain his execution by reason of the judgment aforesaid, and that he to that plea in manner and form aforesaid above pleaded needs not, nor by the law of the land is bound to answer; and this he is ready to verify: wherefore, for default of a sufficient plea of the aforesaid John in this behalf, the said Owyn as before prayeth judgment, and that the said John from his execution by reason of the judgment aforesaid be barred; and that the said Owyn be thereof discharged, &c. and the aforesaid John inasmuch as he sufficient matter in law for him the said John, his execution by reason of the judgment aforesaid against the said Owyn to have and maintain, above hath alleged, which he is ready to verify, which matter the said Owyn doth not deny nor to the same any ways answereth, but the said averment altogether refuseth, as before, prayeth judgment and execution of his debt and damages aforesaid, against the said Owyn to him to be adjudged, &c. and because the justices here will advise themselves of and upon the premises, before they give their judgment thereof, day is given to the parties aforesaid here until the morrow of the Holy Trinity to hear their judgment thereof, &c. because the same justices here thereof are not yet, &c.

DR. DRURY'S CASE,

Pasch. 8 Jacobi 1.

In *Audita Querela* the plaintiff declared that he being in execution upon a *capias utlagatum* at the suit of the now defendant, the Sheriff suffered him to go at large. The defendant pleaded, that after the said escape, and before the *audita querela* brought, the said writ of *capias utlagatum* issued, and was returned *non est inventus*; and thereupon the now plaintiff at the day of the return appeared, and upon oyer of the exigent reversed the outlawry, because it had an uncertain return; *et sic dicit, quod non habetur aliquod tale recordum*; adjudged upon demurrer; the *audita querela* does not lie.

By reversal of an erroneous judgment by writ of error, collateral acts executory are barred, but not collateral acts executed.

Mean acts done in the execution of justice which are compulsive, are not effected by the reversal of the judgment by writ of error; otherwise, if they are voluntary.

Difference between a recovery upon an elder title, and a reversal of a record by writ of error.

When the outlawry is adjudged by the Court to be null and void, it is void *ab initio*.

Difference between a sentence declaratory, by which letters of administration are declared to be void, and sentence of repeal.

*Note. In collateral things executed by execution, the party grieved shall have remedy by *Audita Querela*.*

BRAY
v.
DRURY.
P.VIII.—141 b.

OWYN BRAY brought a writ of *Audita querela* (A) against John Drury, Doctor of the Civil Law, setting forth, that whereas the said Dr. Drury, *Mich. 5 Jac. Regis*, in this Court had recovered against the said Owyn a debt of 200*l.*, and 33*s. 4d.* for damages and costs, and whereas the said Owyn, because he came not into Court to satisfy the said debt and damages, was put in *Exigent*, and thereupon 19 *Maii, anno 6 Regis nunc*, was outlawed: and that the said Owyn, by force of a writ of *Capias utlagatum ad sectam præd' Johannis Drury capt' & imprisonatus fuit*, and in execution for the said debt and damages; and so being in execution, was delivered out of prison by the Sheriff from the said execution, and suf-

Com. Dig. Au-
dita Querela.
Vin. Ab. Audita
Querela.
2 Saund. 148.
3 Black. 405.

(A) The writ of *audita querela* is of common right. Where such writ clearly affords relief to the defendants, the Court will relieve on motion without putting him to the

writ; but where the relief is questionable, the Court will not dispose of the case on motion. *Nathan v. Giles*, 5 Taunt. 558. S. C. 1 Marsh. 226.

(a) Vaugh. 158.

[* 142 a.]

(b) Hard. 27.

†Cro. Eliz. 893.
Poph. 205.
Salk. 273.
Faresl. 29.
Comb. 69. 9 Co.
68. a.

Ognell v. Paston.

In debt against a Sheriff for an escape, he cannot dispute the validity of the writ upon which the party was taken.

(c) 2 Leon. 84, 85, &c. Moor 274. Cr. El. 213, 214, 707. Yelv. 42. Yelv. 403. 2 Bulstr. 64, 65.

ferred to go at large, &c. The defendant pleaded, that after the said escape, and before the purchase of the said writ of *Audita querela*, sc. *Mich. 6 Jac.* the said writ of *Capias ullagatum* was awarded out of this Court returnable *crastino animarum*, at which day the sheriff returned *non (a) est inventus*; and thereupon the same day the said Owyn appeared, and demanded oyer of the *Exigent*, which was read to him; and thereupon it appeared, that the return of the said writ of *Exigent* was uncertain; and thereupon he prayed, *quod ullagaria prædicta in forma præd' promulgata et habita adnullaretur, evacuaretur, et pro nullo pœnitius teneretur: super quo viso brevi præd' et per justiciar' hic tunc plene intellecto, eisdem justiciar' hic tunc constabat, quod allegatio præd' Owyni in exonerationem suam de ullagar' præd' vera extitisset: ideo tunc confid' fuit in eadem curia* hic quod idem Owynus occasione ullagar' præd' in aliquo nonmo lestaretur, nec gravaretur, sed iret inde quietus prout per record' inde in eadem curia hic residen' plenius liquet: et sic idem Johan' Drury dicit quod non habetur aliquod tale recordum ullagariæ præd' quale præd' Owynus per breve et narrationem suam præd' superius supponit: et hoc paratus est verificare: unde petit judicium si ipse ab executione sua præd' de debito et dampnis præd' versus præd' Owynum habend' præcludi debeat, &c.*

And thereupon the plaintiff demurred; and it was objected that the said outlawry was not void, but (b) voidable, and that at the time of the escape (by which the said Dr. Drury was entitled to an action of debt, upon the escape, against the sheriff) the outlawry was in force, and the sheriff shall never take advantage of error in the proceeding against the defendant, but shall be charged for the escape, notwithstanding the record be erroneous. And so it was adjudged in the Exchequer, Trin. 31 Eliz. by Sir Roger Manwood, and the other Barons, where the case was, that Edward Clere, Francis Woodhouse, and William Gervys, 18 Aug. 28 Eliz. acknowledged a recognizance of 200*l.* in the Chancery, to George (c) Ognell, upon which recognizance George Ognell, 16 Jan. 29 Eliz. sued a *scire facias* out of the chancery against the said recognizors, upon which *nihil* was returned; and so upon another *Scire facias* whereupon *mense Paschæ* 29 Eliz. judgment was given, sc. *ideo consideratum fuit per curiam, quod præd' Georgius recuperaret versus prædictos Ed. Fr. et Will. 200*l.** &c. And that the said George have execution against them, whereupon he sued forth a *Levari facias*, upon which it was returned, that they had nothing, for which the Court did award a *Capias ad satisfaciend'* returnable *Octob' Hil'* directed to the Sheriff of Norfolk, Clement Paston, Esq. then sheriff of the same county; by force whereof the said Sheriff arrested the said Francis Woodhouse, and William Gervys 16 Jan. 30 Eliz. And that the said Francis Woodhouse, at the time of the said arrest, was in prison under the custody of the said Sheriff, being attainted of felony; and afterwards the said Francis and William escaped out of the custody of the said Sheriff; upon which escape G. Ognell brought an action of debt against the said Clement Paston, being an accomptant

in the Exchequer. And in that case it was resolved, that the award of the (a) *Capias ad satisfaciend'* was erroneous: for by the law the bodies of the recognizors were not liable to execution, and yet, because the Sheriff could not take advantage of the (b) error, it was adjudged, that he should answer for the escape; and therewith agrees 21 E. 4. 23 b. (n). But it was adjudged, that in the case at bar the *Audita querela* doth not lie; and in this case two points were resolved,—1.(c). A difference was taken and agreed between a thing collateral, executory,* and executed; for when an erroneous judgment is given, and afterwards the judgment is reversed by a writ of error, collateral acts executory are barred thereby, as if a man has judgment in a *quare impedit*, and has a writ to the Bishop, and the Bishop refuses to admit the plaintiff's clerk, now the plaintiff upon this collateral refusal may have a writ of *quare non admisit*; but if the defendant reverses the judgment in a writ of error, and afterwards the plaintiff in the *Quare impedit* brings a writ of *Quare non admisit*, the defendant may plead *null tiel record*: vide 26 E. 3. 75 b. (c) by Wilby and Hill. So it was resolved, if A. be in execution at the suit of B. upon an erroneous judgment, and afterwards escapes, and afterwards the judgment is reversed by a writ of error, the action upon the escape is gone; for he may plead *null tiel* (d) *record*, because without a record the action is not maintainable; but yet it is true, that till the erroneous judgment, or execution, is reversed by a writ of error, the Sheriff or gaoler shall not take (e)

(a) 1 Roll. 897. Yelv. 42. Mo. 274. Cr. El. 3. Cr. Jac. 3.

By reversal of an erroneous judgment by [* 142 b.] writ of error, collateral acts executory are barred.

(b) Cr. El. 165. 576, 707. Cr. Jac. 3, 280, 289. 2 Leon. 85. Dyer 67, pl. 16. Moor 275, 276. 9 Co. 68. a. 2 Roll. Rep. 212. Godb. 403. Hard. 85.

(c) 2 Roll. Rep. 254. Vin. Ab. Collat. A. Vin. Ab. *Quare non admisit*, A.

(d) 1 Sand. 38. Kelw. 18 b.

(e) Hardres 6. Cr. Jac. 3, 280, 289. Cro. El. 165, 576, 707. 2 Leon. 85. Dyer 67. pl. 16. Moor 275, 276. 9 Co. 68. a. 2 Roll. Rep. 212. Godb. 403.

(n) In the report of *Oguel v. Paston*, Cro. Eliz. 165, it is stated that all the Barons were of opinion that the process was well awarded, and maintainable by the law; for it being a debt of record, it is not reason but his body should be liable to execution upon it, as to a common obligation; and this *capias* is not by the stat. West. 2. cap. 45, or 25 Edw. 3.; but by the course of the common law, and the course of the chancery; and precedents are usual there after *scire facias*; and their courses are to be maintained as of other courts; and with this the report of the S. C. in Moore 274, and 2 Leon. 88, agrees. The Court further held that admitting the *capias* lay not, yet it is not void, but erroneous, and the Sheriff shall not take advantage of it. In *Weaver v. Clifford*, Yelv. 42. S. C. 1 Brownl 83. the same point arose. Yelverton, who was one of the judges, says, the opinion of himself, Gawdy and Popham, Js. was that the *capias* did not lie, and that therefore no action could be maintained against the Sheriff. In another report of the same case, which seems to have depended several years, and to have been argued before different judges at different times, 2 Bulst. 62. the

Court is stated to have inclined at first to the opinion that the *capias* did well lie; and Doderidge J. said, and Flemming C. J. agreed with him, that the difference is where the Court hath jurisdiction of the cause, and where not; if the Court hath jurisdiction of the cause, and do misaward the process, this is but error; but where the Court hath no jurisdiction of the cause, and do misaward the process, there all is merely void; and the Sheriff may shew this in discharge of himself: but the case was adjourned, and afterwards, Trin. Term. 11 Jac. the Court gave judgment for the plaintiff in the action, which was debt upon an escape, but was of opinion that the *capias* did not lie. Rolle in his Abridgment Escape, F. pl. 2. says that a writ of error was brought in the Exchequer-Chamber, and that the judgment was reversed, because there was no award of the *capias* by the Court: but it was taken out without warrant, and so merely void. Vid. *Paine v. Pullenham*, Dyer 306. pl. 62. Rolle's Ab. Execution H. pl. 2. Bac. Ab. Execution A. Escape F. Com. Dig. Execution C. and note (F) to the Marshalsea case, 10 Rep. 76 a.

(c) Lege 24 Edw. 3. 75. pl. 97. note in Serjt. Hill's Copy.

But not collateral acts executed.

(a) Cr. Jac. 646.

(b) Postea 143 b.
5 Co. 90 b. 1
Rol. 777, 778.

If the defendant pleads the outlawry of the plaintiff, who replies *nul tiel record*, &c., and the defendant has a day, [** 143 a.*]

&c. before which the record is reversed, the Judges should certify *nul tiel record*.

If two judgments are given, and the last depends upon the first, as upon its foundation, upon reversal of the first by writ of error, or attain, the latter, (which appears in the record to be dependent upon it) shall be reversed also.

Mean acts done in the execution of justice, which are compulsive, are not affected by the reversal of the judgment by writ of error: otherwise, if they are voluntary.

(c) Cr. Jac. 484. Yelv. 36. 1 Brownl. 83. 1 Saund. 38 b. (d) Cro. El. 270. (e) Cro. Jac. 616. Plowd. 266. 2 Bulstr. 175. (f) 1 Roll. 777. Yelv. 153. 9 Co. 119 b. 43 E. 3. 3 a. Palm. 187. Br. Error 23, 47. 8 H. 7. 10 a. 9 H. 6. 38 b. 11 H. 6. 17b. 2 Bulstr. 175. 4 E. 4. 29 a. 6 E. 4. 10 a. (g) Cro. Jac. 645, 646. 2 Bulstr. 175. 5 E. 4. 4 a. Br. Error 46, 170. † Palm. 187.

benefit thereof; for there he cannot plead *nul tiel record*, because, till it is reversed, it remains of force, although there is apparent error, as it is held in 34 H. 6. 2 b. and (21) 22 E. 4. 23 b. But in the same case, if the plaintiff brings an action of debt against the Sheriff or gaoler, upon the escape, and has judgment and execution, and afterwards the first judgment is reversed; yet forasmuch as this judgment upon this (a) collateral thing is executed, notwithstanding the reversal of the first, it remains in force as appears in the like case (b) 7 H. 6. 42 a. where the case in effect is, that the conusee of a statute staple in a writ of detinue of the said statute upon garnishment, recovers by erroneous judgment against the garnishee, and has the statute delivered to him; the garnishee brings a writ of error, and the conusee sues execution upon the statute and has it; there it is held, that although the garnishee doth reverse the judgment, yet forasmuch as the statute is now executed, this execution shall not be avoided by the reversal of the judgment; for the judgment was only to have the statute delivered, and the execution on the statute is a thing executed, not depending upon the judgment. So if a man recovers by erroneous judgment, and presents to a benefice, or enters into the perquisite of a villain, and afterwards the judgment is reversed by writ of error, because these collateral things are executed, they shall not be divested, as it is held in 4 H. 7. 11. and there fol. 12 a. Brian saith, that it was adjudged, that if the defendant pleads that the plaintiff is outlawed, and the plaintiff replies, *quod non habetur aliquod recordum*, &c. and the defendant has a day to bring in the record, and before the day the record is reversed, the Justices should certify *nul tiel record*: and therewith agrees 6 El. Dyer (c) 228. *So in the case at bar, forasmuch as the record is defeated and avoided before the defendant is obliged to plead, he may well plead *nul tiel (d) record*, vide 13 E. 3. Barr. 253. But if two judgments are given, and the last depends merely upon the first as upon its foundation, there if the first fundamental judgment is (e) reversed by writ of error or attain, the latter (which appears in the record to be dependent upon it) shall be reversed also, as in *Assise et (f) Redisseisin*: so of a judgment upon the original, and another judgment in a (g) *Scire facias*, the same law of one judgment given against the tenant and another against the vouchee and the like, 43 E. 3. 3 a. 13 E. 4. 4 a. 8 H. 4. 4. 4 E. 3. 36. 8 H. 7. 10 a. 11 H. 4. 4. 6 a. b. 4 E. 4. 29 a. 6 E. 4. 9 b. 9 H. 6. 38 b. 10 H. 6. 6. And vide † 26 E. 3. 57. (75.) a. b. that by the reversal of the judgment given in a *quare impedit*, the judgment given in a *quare non admisit* is also reversed.

2. There is a difference between mean acts done in the execution of justice, which are compulsive, and acts which are voluntary.

luntary: and, therefore, if an erroneous judgment is given in debt, and the sheriff, by force of a *Fieri facias* (a) sells a term of the defendant, and afterwards the judgment is reversed by a writ of error, yet the term shall not be restored, but only the sum, &c. because the sheriff was commanded and compelled by King's writ to sell it, &c. (D). But if a *capias* (b) *ullagatum* is awarded, whereby the sheriff is commanded to take the body, &c. *et bona et catalla, quæ per inquisitionem invenerit in manus nostras capias ut de vero valore, &c.* and by force of that writ, the sheriff, by inquisition, takes the goods and chattels of the man outlawed and sells them, and afterwards the outlawry is reversed, the party shall be restored to his goods and chattels, because the sheriff was not commanded nor compelled by the King's writ to sell them; and therewith agrees 5 El. Dy. 223. (c) Proctor's case. And according to this resolution it was adjudged in *C. B.* between Amner (d) and Loddington, and afterwards Mich. 26 & 27 El. in a writ of error affirmed in the King's Bench.

Postea 143 b. (d) 1 And. 60. Co. Lit. 351 a. Godb. 26. 1 Leon. 92. 2 Leon. 82. Jenk. Cent. 264. Moor 758. 1 Bulst. 192. 1 Roll. 612. Co. Lit. 351 a. Goldsb.

(a) Ante 96 b. 1 Roll. 778. 5 Co. 90 b. Dy. 363. pl. 24. Moor 573. Cro. El. 278. Cro Jac. 246. Jenk. Cent. 264. 2 Leon. 92. 3 Leon. 89. 90. Godb. 27, 28. Yelv. 180. Goldsb. 103, 104. (b) Cr. El. 270, 278. Moor 270. 1 Roll. 778. Dy. 223. pl. 26. (c) 1 And. 36. pl. 91. O. Bend. 27. pl. 108. Godb. 84. Co. Lit. 128 b. 8 Co. 96 b. 103, 104.

3. There is a difference between a recovery upon an elder title, and a reversal of a record by a writ of error: and, therefore, if A. recovers dower in an ancient demesne against H. and has execution, the tenant reverses the judgment in a writ of false judgment; and because the woman has held the land for two years, between the first judgment and the reversal, it was inquired of the yearly value of the land, and the two years taxed to twenty marks; and thereupon the tenant sued a *scire facias* against the woman to have execution of the said twenty marks. In bar of which she pleads, that she has brought a writ of right close, in the nature of a *cui in vita*, against the said H, the now plaintiff, and process continued till she recovered the land by elder title, and demands judgment if of the issues of the same lands by any judgment recovered since, H. ought to have execution: but it was adjudged, that forasmuch as the judgment given for H. remained in force, by force of which he should have the said twenty marks as damages *severed from the land, and the recovery in the *Cui in vita* doth not refer to them, for this reason, although A. had recovered by elder title, H. should have execution of the damages, 20 E. 3. *scire facias* 123. † in Herbert's case.

Difference between a recovery upon an elder title, and a reversal of a record by writ of error.

4. The case at bar is stronger, because the judgment to avoid the said outlawry is declaratory, which declares the outlawry to be null, and the proceeding therein to be without warrant, and void, and all that without a writ of error, because there is a nullity in the outlawry, forasmuch as the writ of *exigent*, which is the warrant to proceed to outlawry, wants substance, and by consequence no warrant in law; and, therefore, when it is so declared by the judgment of the Court, it is void ab

[* 143 b.] Vin. Ab. Error 1b.

† Palm. 302. When the outlawry is adjudged by the Court to be null and void, it is void ab initio.

(a) Vide note (c) *Hoe's case*, Vol. III. p. 183.

(a) Ante 143 a.
1 And. 36. pl.
91. O. Bendl.
27. pl. 108.
Co. Lit. 128 b.
Goldb. 84.
(b) Br. privilege 28, 29.
Fitz. corpus cum causa 8, 9.
(c) 2 Hen. 5. c. 2. Cro. Car. 261.
(d) Cro. El. 33. Cro. Jac. 43. Yelv. 57.

initio; vide (a) Proctor's case, 5 El. Dyer 223. In 38 H. 6. 4 b. and 12 b. One who had cause of (b) privilege in the Common Pleas, was arrested in London, and before judgment the defendant delivered a writ of *supersedeas* in the inferior Court, and notwithstanding that, the recorder proceeded to judgment, and thereupon his body was taken in execution, and afterwards his body was brought into C. B. by a writ of (c) *Corpus cum causa*; and because after the (d) *supersedeas* there was a nullity in the proceeding as well to judgment as in execution, the Court awarded that the party should be discharged of the execution; and so he was dismissed without suing any writ of error; for by this declaratory award, the judgment and execution are utterly void.

Difference between a sentence declaratory, by which letters of administration are declared to be void, and a sentence of repeal.

(e) Dyer 339. pl. 16. Antea 135 b. 3 Co. 78 b. 6 Co. 19 a. 1 Sid. 21. 2 Keb. 12. Cro. El. 460.

And vide 17 El. Dyer 339 (c) administration is committed to the wife, of the goods, &c. of the husband, who recovers debt as administratrix, depending which suit, the son of the intestate by covin betwixt him and the defendant procures new administration to him and his mother, no cause of revocation of the first expressed in the second, and after judgment releases to the defendant, the wife sues execution, the defendant upon this release brings an *audita querela*, and the defendant pleads the matter *supra*, and sentence declaratory that the second administration was void, and adjudged *pro defendente*. But if the letters of administration had been good, and the administrator makes a release, and afterwards the letters of administration are repealed, there the release is good: so there is a difference between a sentence declaratory, by which letters of administration are declared to be void, and a sentence of repeal, which allows them good till they are repealed (e).

Note, In collateral things executed by execution, the party grieved shall have remedy by *audita querela*.

Nota, reader, where it is said before in the first difference, that collateral things executed by execution upon escape, or upon the statute recovered in the writ of *detinue*, in (f) 7 H. 6. 42 a. b. shall not be avoided by the reversal of the first judgment, the same is true; and yet I conceive, that he shall have remedy upon the reversal of the judgment, by (g) *Audita Querela*, because the cause and ground of the collateral action is disproved and avoided by the reversal of the first *judgment; and the first plaintiff restored to his former action, upon which he may have his just and due remedy. And it is like the case in Dyer 3 Eliz. 203. executors have judgment in account, and have the defendant in execution for the arrearages; now the will is annulled, *quia* the testator an idiot, and the record spiritual was removed into the Chancery by writ, and sent into the King's Bench, where the action was brought; and thereupon the defendant brought an *audita querela*, because the will

[* 144 a.]
Where a defendant is in execution at the suit of an executor, if the will be annulled in the spiritual Court, an *audita querela* will lie.

(f) Ante 152 b. 3 Co. 90 b. Br. Error 661. Roll. 308, 777, 778. (g) Cro. Jac. 645, 646. Dyer 203, 204. pl. 75. Wentw. 21. Swinb. 47. Yelv. 83. 2 Sand. 149. Orph. Leg. 26. 1 Browal. 91. Co. Ent. 89, 90. Noy. 15. Vin. Ab. Aud. Quer. D. pl. 31.

(e) Vide note (a) *Peckman's case*, Vol. III. p. 294.

was disproved: and it was resolved, in *Camera Scaccarii, anno 35 H. 8.* (as I have heard, it appears by the record) that the *Audita querela* did well lie (F).

(r) Vide *Turner v. Davies*, 2 Saund. 148. S. C. [1 Mod. 62. 2 Keb. 668.] An *audita querela* lies to discharge a judgment obtained by an administrator, where, after the judgment, the administration is repealed. And in *Barnhurst v. Yelverton*, Brownl. 91. S. C. Yelv. 83. judgment was obtained by an administrator, and afterwards the admini-

nistration was revoked, and the plaintiff proceeded and took the defendant in execution; and upon motion, the Court held the execution void, and that the defendant ought to be discharged, because it issued erroneously. Vide *Beck's case*, Brownl. 29. *Patnell v. Brook*, Sty. 417. Vin. Ab. Exors. M. 10. Toller, Law of Exors. 131.

DAVENPORT'S CASE,

[144 b.]

Trin. 8 Jacobi 1.

If A. lessee for years of an advowson, grants the next avoidance to B., if it shall happen to become void during the term; and then surrenders the term to C., who has the inheritance, and the church becomes void before the end of the term; the grant to B. is good, and he shall have the next avoidance; for a man cannot derogate from his own grant.

If lessee for years grants a rent-charge to a stranger, and after surrenders his term to the lessor, the stranger shall have the rent during the term.

BRADSHAW
v.
DAVENPORT
and
Others.
P.VIII.—144 b.

ROBERT BRADSHAW brought a *quare impedit* against John Davenport, George Wood, Clerk, and the Bishop of Lincoln, of the vicarage of the church of Orton *super Montem*, in the county of Leicester, (which began *Trinit' 7 Jacobi, Rot' 1008.*) And the case was such, George Hastings, Earl of Huntingdon, was possessed of the rectory of Orton, to which the advowson of the said vicarage was appendant for fifteen years; and by his deed, 18 *Maii*, 19 Eliz. granted to Robert Bradshaw, now plaintiff, as he alleged in his declaration, *Primam et (a) proximam advocacion' et donationem præd' vicariæ de Orton cum eadem prim' et proxim' extunc vacare contingeret per aliquas vias seu media quæcunque, si ead' contingeret fore vacua durante termino annorum adtunc in esse de rectoria de Orton concess. præfato comiti per præfatum nuper Episcopum Oxonien'*. The defendants pleaded, that after the said grant of the next avoidance, the said Earl so being of the said rectory, to which, &c. possessed, died thereof possessed, intestate, *post cujus mortem, scil' primo die Maii*, 1605, administration of his goods, &c. was committed to Henry, now Earl of Huntingdon; and afterwards

Acc. Touch.
286, 301.

(a) Cro. Jac.
691.

- (a) Palm. 484. the said now Earl, 9 Feb. 3 Jacobi (a) surrendered, his said term in the said rectory, to which, &c. to the Bishop of Oxford then in reversion, which he accepted, *per quod præd' terminus annorum de et in rectoria præd' cum pertin' ad quam, &c. determinavit*, and the bishop demised the said rectory, with the appurtenances, to Davenport, one of the defendants, for his life; and afterwards the said vicarage became void, &c. upon which the plaintiff demurred; and the sole question

[* 145 a.] * of this case was, if by the said surrender the said grant of the next avoidance was void or not. And it was objected, that the said grant of the next avoidance was upon express limitation, if the vicarage became void during the term then *in esse*, and by the surrender the term was merged and extinct; so that the vicarage became not void during the term, because that happened after the surrender. But if the limitation had been during the years, there it had been otherwise, for the years could not determine but by (b) effluxion of time (A).

- (b) Co. Lit. 45 b. 1 Co. 154 a.

- (c) Palm. 484.

- (d) Cr. Jac. 691. Co. Lit. 379 a. Palm. 484. Hob. 41. (e) 1 Roll. Rep. 310. 2 Roll. Rep. 393. Latch. 25. Palm. 433, 437. Ante 56 b. Wing. Max. 235. 4 Co. 73 b. 5 Co. 11 a. 11 Co. 60 a. 10 Co. 39 a. Co. Lit. 191 a.

- 205 a. Lit. Rep. 111. 2 Inst. 365. 2 Sand. 351. 2 Bulst. 131. 1 Mod. Rep. 190. Hard. 92. Hob. 170. † Winch. 96. 1 L. Raym. 328. 1 P. Wms. 18. Cro Jac. 328. (f) Hob. 41.

But it was answered and resolved, that notwithstanding the surrender, yet the plaintiff should have the next (c) avoidance, and that for three reasons:—1. The said limitation implies no more than the law would have said; for if tenant for years grants the next (d) avoidance, the law implies this limitation, if the church becomes void during the term, and therefore (e) *expressio eorum quæ tacite insunt nihil operatur*. 2. The grantor himself would derogate from his own grant, and would make it void at his pleasure, and that is against the rule of law, *sc.* that the grant of every one shall be taken most strongly against himself, and most beneficially for the grantee (b). And as to that, the notable case of (f) Thurston de Holland, Parson of Preston, in 6 E. 3. 54 b. and 55 a. was cited, where the case was; that in the time of Richard I. debate was between the Abbot of S. and Theoband C. upon the advowson of the church

(A) That the word *term* may signify the time, as well as the interest, and shall be taken in that sense which will support the intention of the grantor, vide *Wright v. Cartwright*, 1 Burr. 282.

(b) Notwithstanding the merger of the particular estate, persons who have interests affecting the estate which is merged will be left in the same condition in point of benefit, as if no merger had taken place. A person having such derivative interest may be benefited, although he cannot be prejudiced by the merger of the estate out of which his interest is derived, or on which it is dependent. Therefore when a tenant for life makes a lease for years at a rent, and the estate for life becomes merged, so that the relation of landlord and tenant ceases as between the parties; the remedy for the rent, and for covenants annexed to the reversion,

will cease with the reversion to which the rent and covenants were annexed and incident. *Lord Treasurer v. Baron, Moor 94. Webb v. Russell*, 3 T. R. 393. *Stoakes v. Russell*, 3 T. R. 678., affirmed on error, 1 H. Black. 562. And in *Doe v. Pyke*, 5 M. and S. 146., which case recognizes the authority of *Davenport's case*, it was held that, where A. having a lease for three lives of a manor, where, by the custom, the copyholds were demisable by copy, made a lease for years by indenture, of a copyhold tenement to B., and afterwards the estate of A. was surrendered to the lord of the fee, such lease, though not warranted by the custom, and though it suspended the copyhold tenure, was good to pass an interest to B., and should have continuance during the existence of the survivor of the three lives.

of Preston, and thereupon they agreed, and a fine was levied between them 15 Mich. 6 R. 1. before the Archbishop of Canterbury, the Bishop of Rochester, &c. then Justices of C. B. between the aforesaid Abbot and the said Theoband; by which fine the Abbot granted the advowson to T. and to his heirs for ever, so that at every presentation by T. or his heirs, the clerks so presented, &c. should pay to the said Abbot and his successors for ever ten marks *per ann.* which accord was made in the presence of the Ordinary of the place, who assented to it, at which time the church of Preston was void; and upon that fine the successors of the Abbot of S. brought a writ of annuity against the said T. de Holland, Parson of P. And there Parning, Serjeant, took exception to the declaration, that forasmuch as the grant of the annuity is in a special manner to be paid by the Clerks who should be presented by T. or his heirs, that the plaintiff ought to have shewed in his declaration, that the defendant was presented by the said T. or his heirs. To which Sadlier said, we conceive that the Parson shall be charged by whomsoever he is presented. And Herle, C.J. who gave the rule, said, that although T. had aliened the advowson, the annuity would not be thereby extinct; wherefore Parning passed over to another matter: by which case it appears, that although T. had aliened the advowson, and although the annuity in the body of the grant is limited to be paid by the presentees of T. or his heirs; yet the presentee of his alienee should pay it, for otherwise, *by his own grant, he would defeat the annuity which he himself had granted.

5 Co. 17 b.
[*145 b.]

Note, reader, in this case of 6 E. 3. there are divers things worthy observation, and amongst them the antiquity of the (a) Common Pleas; for it appears thereby that it was a court long before the statute of Magna Charta, made in 9 Hen. 3. as appears also in (b) 26 Ass. pl. 24. where it appears, that King Henry 1. made letters patent of confirmation to the Abbot of B. of all usages; and that they should have conusans of all manner of pleas, so that the Justices of one Bench, nor the other, nor Justices of assise, should nothing intermeddle, &c. which is a direct proof, that in the time of King Henry 1. there were courts of the one Bench and the other, and also Justices of Assise, &c.

(a) Co. Lit. 71
b. Pref. to 8
Co.

(b) Pref. 3
Rep. p. 5. Fitz.
Conusans 57.
Br. Conusan.
40.

3. The term for the benefit of the grantee has to some respect continuance; and therefore if lessee for years grants a rent charge, and afterwards surrenders, yet for the benefit of the grantee the (c) term has continuance; although *in rei veritate* it is determined; and therewith agrees 5 Hen. 5. 10 a. But it is true, that the lessee himself, by his surrender, may prejudice himself of an (d) increase of an estate to be made to himself, as it is resolved in 35 H. 8. (e) *Exposition de parols* 44. *Vide* the Rector of Cheddington's case, M. 38 Eliz. in the First Part of my Reports, fol. 154 a.

Third reason
for the resolution
in the
principal case.
(c) 9 E. 4. 18.
1 Jones 62.
Cro. Car. 102.
Lit. Rep. 336.
Dall. 65. Poph.
40. 1 Co. 67 a.
87. 9 Co. 107 b.
Plowd. 198 a.
Co. Lit. 338 b.

(d) Ante 75 b. (e) Br. Exposition de parols 44. 1 Co. 145 a. Bridgm. 102. Co. Lit. 45 b. 6 Co. 79. 7 Co. 38 b. 24 E. 4. 13.

[146 a.]

THE SIX CARPENTERS' CASE,

Mich. 8 Jacobi 1.

VAUX
v.
NEWMAN
and
Others.
P.VIII.—146 a.

Resolved, —1. When an entry, authority, or licence, is given to any one by the law, and he abuses it, he shall be a trespasser *ab initio*: but not where the entry, authority, or licence, is given by the party. 2. An act of omission cannot make a party a trespasser *ab initio*.

Note. *Tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding, makes neither the one nor the other wrongful.*

If the plaintiff makes a sufficient tender after the avowant has returned irreplevisable, he may have an action of Detinue for the detainer after; or he may, upon satisfaction made in court, have a writ for the re-delivery of the goods.

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c. and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house *præd' tempore quo, &c. et diu antea et postea*, was a common Wine Tavern, of the said John Vaux, with a common sign at the door of the said house fixed, &c. by force whereof the defendants, *præd' tempore quo, &c. viz. hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d. and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same (A): upon which the de-

(A) When an authority or licence given by the law is abused, in an action for the trespass, if there is a plea in justification, the plaintiff must either new assign the abuse, or he must shew it in his replication. *Monprivatt v. Smith*, 2 Camp. 175. *Ditcham v. Bond*, 3 Camp. 524. *Dye v. Leatherdale*, 3 Wils. 20. Per Buller, *J. Gundry v. Feltham*, 1 T. R. 338. *Taylor v. Cole*, 3 T. R. 297. S. C. on error, 1 H. Black. 555. But where the declaration complains of trespasses in breaking and entering the plaintiff's close, and beating for game, &c. on divers days and times, between such a day and the day of

exhibiting the bill, and the defendant pleads a licence generally, he is bound to shew a licence co-extensive with the trespasses proved; and therefore the plaintiff having shewn a trespass prior to the date of the licence, is entitled to a verdict, although he did not new assign, but took issue on the plea of licence. *Barnes v. Hunt*, 11 East. 451. The distinction seems to be that in the first case, *viz.* the abuse of the authority given by law, the trespass is entire; and the whole trespass complained of is answered, at least in part, by the special plea; whereas in *Barnes v. Hunt*, the trespasses being dis-

defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law) makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or (a) licence, is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*: but where an entry, authority, or licence, is given by the (b) party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in the case of a general authority or licence (c) of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. Vide 11 H. 4. 75 b. But when the party gives an authority or licence himself to do any thing, he cannot, for any subsequent cause, punish that which is done by his own authority or licence, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. Vide 12 E. 4. 8 b. 21 E. 4. 19 b. 5 H. 7. 11 a. 9 H. 6. 29 b. 11 H. 4. 75 b. 3 H. 7. 15 b. 28 H. 6. 5 b. But if he who enters into the inn or tavern doth a trespass, as if he (d) carries away any thing; or if the lord who distrains for rent (b), or the owner for damage-feasant, works or kills the (c) 191. 5 H. 7. 11 a. (d) Perk. sect. 191. 2 E. 4. 5. Cro. Car. 196. Yelv. 96. (e) 12 E. 4. 8 b. 9 Co. 11 a. 1 And. 65. Cro. Jac. 148. Perk. sect. 191.

1. When an entry, authority, or licence, is given to any one by the law, and he abuses it, he shall be a trespasser *ab initio*; but not where the entry, authority, or licence, is given by the party.

(a) 2 Roll. 561. Yelv. 96, 97.

(b) 3 Black. Com. 213. 3 H. 7. 11 a. Perk. sect. 191. Yelv. 96, 97. 21 E. 4. 19 b.

(c) 2 Roll. 561. 21 E. 4. 19 b. 76 b. per Catesby. Yelv. 96, 97. Perk. sect.

tinct, so that each trespass might of itself be the subject matter of a separate count, or of a distinct action, the plea is tantamount to a several answer to each trespass, and fails entirely as to one.

For what acts will make a man a trespasser *ab initio*, and what will not, vide Vin. Ab. Trespass G. a. Ab. Trespass B. Com. Dig. Trespass C. 2. Roll. Ab. Trespass G. *Dye v. Leatherdale*, *Taylor v. Cole*, ubi sup. *Mayor of Northampton v. Ward*, 1 Wils. 107. *Reynolds v. Clarke*, 2 Ld. Raym. 1399. *Gates v. Bayley*, 2 Wils. 313. *Gimbert v. Pelah*, 2 Stra. 1272. *Reed v. Harrison*, 2 Black. 1218. *Winterbourne v. Morgan*, 11 East. 395. ——— *v. Blades*, 5 Taunt. 198. Bull. N. P. 81 a.

(b) By 11 Geo. 2. c. 19. s. 19. when any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents; the distress itself shall not be deemed to be unlawful, nor the party or parties making it be therefore deemed a trespasser or trespassers *ab initio*: but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage sustained thereby, and no more, in any actions of trespass,

or on the case, at the election of the plaintiff or plaintiffs. Since this act, it has been held, that trespass lies against a landlord, who, on making a distress for rent, turned the plaintiff's family out of possession, and kept possession of the premises on which he had impounded the distress. *Etherton v. Popplewell*, 1 East. 139. And where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress; it was held by the Court, that trespass might be maintained; by Lord Ellenborough, and Grose, J., on account of the taking and removing the goods from the premises, and disturbing the plaintiff's possession after the time when they ought to have been removed, and to which position Le Blanc, J. assented. Bayley, J. held, that trespass is the proper remedy against a person who has made a distress, continuing upon the premises after the time allowed by law. *Winterbourne v. Morgan*, 11 East. 395. The option given by the act is "to maintain trespass where, by the general rules of law, trespass would be the proper remedy; and case where case would be so." Per Lord Ellenborough, ib. 401.

- (a) 2 Roll. 561.
11 H. 4. 75 b.
Fitz. Tresp.
176. Br. Tresp.
97. Br. Repli-
ca. 12.
(b) 3 Roll. 561.
18 H. 6. 9 b.
2 Inst. 546.

2. An act of omission cannot make a party a trespasser *ab initio*.

- (c) Cr. Car.
196. 2 Bulst.
312. 1 Roll.
Rep. 130. Acc.
1 L. Raym. 188.
acc. Willes 637.
acc. 11 East.
402.

(d) Lit. Rep. 34.
Dr. and Stud.
lib. 2. 112 b.
Heti. 16.

- (e) 1 Roll. Rep.
60. 2 Bulst.
312.

(f) 1 Sid. 5. 12
E. 4. 9 a. b.

[* 147 a.]

- (g) 12 E. 4. 9 b.
N. It is good
law.

(h) 12 E. 4. 9 b.

- (i) 1 Sid. 5.

distress; or if he who enters to see waste breaks the house, or (a) stays there all night; or if the commoner cuts down a tree, in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if (b) a purveyor takes my cattle by force of a commission, for the King's house, it is lawful (c): but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6. 19 b. *Et sic de similibus*.

2. It was resolved *per totam curiam*, that (c) not doing, cannot make the party who has authority or licence by the law a trespasser *ab initio*, because not doing is no trespass; and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c. and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio* (d); and therewith agrees 33 H. 6. 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a Replevin, he shall recover (d) damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g. *temp*. E. 1. Replevin 27. 27 E. 3. 88. 45 E. 3. 9. So in the case at bar, for not (e) paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point (f) 12 Edw. 4. 9 b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the *taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put, is not (g) law, for it is no trespass, but the taverner shall have an action of debt: and there before (h) Brown held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have (i) a special action of debt: *scil.* that A. did put cloth to him to make a gown thereof for the said A. and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor over-values the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessaries thereof, he shall not have an action

(c) Purveyance abolished 12 Car. 2. c. 24.
Vide 4 Black. Com. 116.

(d), *Contra*, Rolle's Ab. Tresp. G. pl. 5.

of debt for his own value, and declare of a retainer of him to make a gown, &c. for so much, unless it is so especially agreed. But in such case he may (a) detain the garment until he is paid, as the hostler may the horse. *Vide* Br. Distress 70. and all this was resolved by the court. *Vide* the Book in 30 Ass. pl. 38. John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and (b) before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3. 8 b. in the Mr. of St. Mark's case; and so is the opinion of Hull to be understood in 13 H. 4. (c) 17 b. which opinion is not well abridged in title Trespass 180. Note, reader, this difference that tender upon the (d) land before the (e) distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful: tender after (f) the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined (g). But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *Detinue* for the detainer after; or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the said* books in 13 H. 4. 17 b. 14 H. 4. 4. *Registr' Judic'* 37. 45 E. 3. 9. and all the books before. *Vide* 14 Ed. 4. 4 b. 2 H. 6. 12. 22 Hen. 6. 57. Doctor and Student, lib. 2. cap. 27. Br. Distress 72. and Pilkington's case, in the fifth part of my Reports, fol. 76. and so all the books which *prima facie* seem to disagree, are upon full and pregnant reason well reconciled and agreed.

(a) Hob. 42.
Yelv. 67. Cro.
Car. 271, 272.
Br. Distress 71.
Palm. 223. Hutt.
101. 22 E. 4.
49 b. Moor 877.
5 Ed. 4. 2 b.
1 Roll. Rep. 449.
2 Roll. Rep. 438.
2 Roll. 85, 92.
3 Bulstr. 269.
270.
(b) Br. Distress
37. Br. Tender,
&c. 18.
(c) 2 Roll. 561.
(d) 2 Sid. 40.
(e) 5 Co. 76 a.
2 Inst. 107.
(f) 2 Roll. 561.
1 Brownl. 173.
2 Inst. 107. 5
Co. 76. a.
12 Mod. 461.
Lutw. 1596.
Gilb. Rep. 82.

[* 147 b.]

(x) An action on the case will not lie for detaining cattle distrained and impounded, where a tender of amends had been made before the impounding; the proper remedy being trespass or replevin. *Ancomb v. Shew*, 1 Camp. 285. S. C. 1 Taunt. 261. *Linden v.*

Hooper, Cowp. 414. Nor will such action lie where the tender was after impounding. *Sheriff v. James*, 1 Bing. 341. S. C. 8 B. Moore, 334. and vide note (A) *Pilkington's case*, Vol. III. p. 152.

[148 a.]

EDWARD ALTHAM'S CASE.

Trin. 8 Jac. 1.

In the Common Pleas.

Dower, by T. L., and M. his wife, for lands in G. against E. A. and Margaret his wife.

Plea.

T. N. seised in fee, of the tenements, held in socage.

10 Ap. 1592. made his will, and devised the said tenements to Z. N. his younger son for life, and died.

Z. entered, and was seised for life.

[* 148 b.]

And the reversion descended to T. N., son and heir of T. N. the husband.

THOMAS LAWRENCE, and Marcia his wife, by Charles Cardinal their attorney, demand against Edward Altham, Gent. and Margaret his wife, the third part of 100 acres of land, 10 acres of meadow, and 60 acres of pasture, with the appurtenances in Gosfield, as the dower of the said Marcia, of the endowment of Thomas Nash the elder, sometime her husband, &c. And the aforesaid Edward and Margaret, by John Rowley, their attorney, come and say, that the aforesaid Thomas Lawrence, and Marcia, the dower of the said Marcia, of the tenements aforesaid, with the appurtenances, whereof, &c. of the endowment of the said Thomas Nash, some time the husband, &c. against them ought not to have, because they say that the said Thomas Nash, some time the husband, &c. was seised of the tenements aforesaid, whereof, &c. in his demesne as of fee, and held the same of John Wentworth, Esq. as of his manor of Gosfield with the appurtenances in the county aforesaid, in fee socage, that is to say, by fealty only, for all manner of services and demands; and the said Thomas being so seised of the said tenements with the appurtenances whereof, &c. on the 10th day of April, in the year of our Lord 1592, at Gosfield aforesaid, made his testament and last will in writing, and by the same his last will, willed and bequeathed the tenements aforesaid, with the appurtenances, whereof, &c. to one Zachary Nash, younger son of the same Thomas Nash, to have and to hold to the said Zachary, for the term of his life, and afterwards there died of such estate thereof so seised; after whose death the said Zachary entered into the tenements aforesaid, with the appurtenances, whereof, &c. and was thereof seised in his demesne as of freehold, for the term of his life, by virtue of the bequest aforesaid, *and the reversion of the tenements aforesaid, with the appurtenances, whereof, &c. after the death of the said Thomas, did descend to one Thomas Nash as son and heir of the aforesaid Thomas Nash, some time husband, &c. by which the said Thomas the son was seised of the said reversion of the tenements aforesaid, with the appurtenances, whereof, &c. as of fee and right; and the said Thomas so thereof being seised, and the aforesaid Zachary of the tenements aforesaid, with the appurtenances, whereof, &c. so as before is said, being seised, the aforesaid Marcia, after the death of the said

Thomas Nash, some time her husband, &c. in the widowhood of the said Marcia, whilst she was single, that is to say, on the 27th day of April, in the 35th year of the reign of the lady Elizabeth, late Queen of England. at Gosfield aforesaid, by her writing of release, which the said Edward and Margaret sealed, with the seal of the said Marcia, bring here into court, whose date is the same day and year: by the name of Marcia Nash, the widow of Thomas Nash late of Feringe in the county of Essex, deceased, remised, released, and altogether for her, her heirs, executors, and administrators, for ever quit claimed, to the aforesaid Thomas Nash, son and heir of the aforesaid Thomas Nash, some time the husband of the said Marcia, by the name of Thomas Nash of Wethersfield in the county aforesaid, yeoman, son and heir of the said Thomas Nash, late her husband, all and all manner of actions, as well real as personal, all suits, quarrels, and demands whatsoever, which she the said Marcia, or her executors, against the said Thomas Nash the son, or his executors, they ever have or had, then had or ought to have, or any ways then might or would have by reason of any thing, cause, or deed whatsoever, from the beginning of the world, unto the day of the date of the same writing of release; after which writing of release to the aforesaid Thomas the son, made by the said Marcia, as before is said, the aforesaid Thomas the son, of the reversion of the tenements aforesaid, with the appurtenances, whereof, &c. in form aforesaid, being seised, at Gosfield aforesaid, died of such his estate thereof seised; after whose death the said reversion of the tenements aforesaid, with the appurtenances whereof, &c. did descend to the aforesaid Margaret, as daughter and heir of the aforesaid Thomas the son, by which the said Margaret was seised of the said reversion of the tenements aforesaid, with the appurtenances, whereof, &c. as of fee and right, and she the said Margaret so of the same reversion, as before is said, being seised: and the aforesaid Zachary of the tenements aforesaid, with the appurtenances, whereof, &c. in form aforesaid being seised, the said Zachary, afterwards at Gosfield aforesaid, died of such his estate thereof seised: after whose death the said Margaret, entered into the tenements aforesaid, with the appurtenances, whereof, &c. and was thereof seised in her demesne as of fee, and so thereof being seised, the said Margaret afterwards, and before the day of bringing the original writ aforesaid, of the said Thomas Lawrence and Marcia, at Gosfield aforesaid, took to husband the aforesaid Edward Altham, by which the said Edward and Margaret were, and yet are, seised of the tenements aforesaid, with the appurtenances, whereof, &c. in their demesne as of fee in the right of the said Margaret (A): and this they are ready to verify; whereupon they pray judgment if the aforesaid

The said M. during her widowhood, 27 Ap. 35. Eliz. released to T. N., son and heir of T. N. the husband, all and all manner of actions as well real as personal, all suits, quarrels, and demands which she or her executors ever had, or might have against the said T. N. the son.

T. N. the son died.

The said reversion descended to the said Margaret, as daughter and heir to T. N. the son.

Z. died, Margaret entered and was seised in fee.

[* 149 a.]

And before the bringing the original writ married the said E. A. by which the said E. A. and Margaret were and are seised in fee in right of the said Margaret, whereupon they pray, &c.

(A) That this is the correct mode of pleading the seisin of husband and wife, where the estate belongs to the wife in fee, vid. n. 4. *Took v. Glascock*, 1 Saund. 253.; and vid. n. 2. *Greene v. Cole*, 2 Saund. 293.

The said T. L.,
and M. his wife
pray oyer of
the release,
and it is read
to them.

said Thomas Lawrence and Marcia, dower of the said Marcia, of the tenements aforesaid, with the appurtenances, whereof, &c. of the endowment of the said Thomas Nash, some time the husband, &c. against them ought to have, &c. And the aforesaid Thomas Lawrence and Marcia pray oyer of the aforesaid writing of release; and it is read unto them in these words, "To all faithful people to whom this present writing shall come, Marcia Nash, the widow of Thomas Nash, late of Feringe in the county of Essex, deceased, greeting in our Lord God everlasting, know ye, that I the aforesaid Marcia being in my pure widowhood, and having full power to remise, release, and altogether for me, my heirs, executors, and administrators, for ever to quit claim, to Thomas Nash of Wethersfield in the county aforesaid yeoman, son and heir of the said Thomas my late husband, all and all manner of actions, as well real as personal, suits, quarrels, and demands whatsoever, as also all my dower, and title and action of dower, to me appertaining, by the death of the said Thomas my husband, of any of his lands and tenements in Wethersfield aforesaid, what or which I the said Marcia, or my executors against him the said Thomas Nash the son, or his executors, I ever had, have, or any ways hereafter may have, (have or may have) by reason of any thing, cause, or deed whatsoever, from the beginning of the world, unto the day of the date of this present writing of release. And further know ye, that I the aforesaid Marcia have given and remised to the said Thomas Nash the son, all the goods late of the said Thomas my husband, which were in the possession of him the said Thomas the son, or his assigns, at the time of the making of this writing of release: in witness whereof to this my present writing, I have set my seal, dated the 27th day of April, in the 35th year of the reign of our lady Elizabeth, by the grace of God of England, France, and Ireland, Queen, Defender of the Faith, &c." Which being read and heard, the said Thomas Lawrence and Marcia say, that they for any thing before alleged, ought not to be barred from having the dower of the said Marcia, because they say, that the aforesaid Thomas Nash, some time husband, &c. in his lifetime, and at the time of his death, was seised as well of the tenements aforesaid, with the appurtenances, whereof, &c. in Gosfield aforesaid, as of two messuages, and 200 acres of land, with the appurtenances in Wethersfield aforesaid, in his demesne as of fee; and so thereof being seised at Gosfield aforesaid, by his last will and testament in writing devised the tenements aforesaid, with the appurtenances whereof, &c. in Gosfield aforesaid, to the aforesaid Zachary Nash, younger son of the said Thomas Nash, some time husband, &c. and afterwards at Gosfield aforesaid, died; after whose death the said Thomas Nash the younger, as son and heir of the said Thomas Nash, some time husband, &c. entered into the tenements aforesaid, with the appurtenances in Wethersfield aforesaid, and was thereof seised in his demesne as of fee. And the said Zachary

Replication.

[* 149 b.]

T. N. the husband was seised in fee as well of the tenements aforesaid, as of two messuages and 200 acres of land in W., and devised the said tenements in G. to the said Z. and died.

T. N. the son entered into the tenements in W. and was seised in fee.

into the tenements aforesaid, with the appurtenances, whereof, &c. in Gosfield aforesaid entered, and was thereof seised in his demesne as of freehold for the term of his life; and the said Thomas Lawrence and Marcia farther say, that at the time of the death of the aforesaid Thomas Nash, some time husband, &c. the aforesaid Zachary was within the age of 21 years, that is to say, of three years, by which the said Marcia, whilst she was single, as guardian and for nurture of the said Zachary entered into the tenements aforesaid, with the appurtenances whereof, &c. in Gosfield aforesaid, and was thereof possessed, the aforesaid Thomas Nash the son being seised of the tenements aforesaid, with the appurtenances in Wethersfield aforesaid, and that the said Zachary being seised of the tenements aforesaid, with the appurtenances, whereof, &c. in Gosfield aforesaid, in form aforesaid; and the said Marcia in form aforesaid so being possessed, afterwards, and before the making of the aforesaid writing of release here in Court brought, at Gosfield aforesaid, it was concluded and agreed between the said Marcia, whilst she was single, and the aforesaid Thomas Nash the son, that the said Marcia should release to the said Thomas Nash the son all her dower happening to her by the death of the aforesaid Thomas Nash some time the husband, &c. of all lands and tenements of the said Thomas, in Wethersfield aforesaid; and that the said Thomas Nash the son should enfeof John Tiler the elder, and John Tiler the younger, and their heirs, of the tenements aforesaid, with the appurtenances, whereof, &c. in Gosfield aforesaid, to the use of the said Zachary, and the heirs of his body lawfully begotten: and the said Thomas Lawrence and Marcia farther say, that the aforesaid Thomas Nash the son being seised of the tenements aforesaid, in Wethersfield aforesaid, in the form aforesaid; and the aforesaid Marcia of the tenements, with the appurtenances, whereof, &c. in Gosfield aforesaid, being possessed, the said *Marcia afterwards, that is to say, on the aforesaid 27th day of April, in the 35th year of the reign of the said lady Elizabeth, late Queen of England abovesaid, whilst she the said Marcia was single, at Gosfield aforesaid, the aforesaid writing of release to the aforesaid Thomas the son, sealed and delivered: and the aforesaid Thomas Nash the son, on the 28th day of April, in the 35th year of the reign of the said late Queen aforesaid; at Gosfield aforesaid, enfeofed the aforesaid John Tiler the elder, and John Tiler the younger, and their heirs, of the tenements aforesaid, with the appurtenances, whereof, &c. in Gosfield aforesaid, to the use of the aforesaid Zachary, and the heirs of his body lawfully begotten; and afterwards he the said Zachary, at Gosfield aforesaid, died without heir of his body lawfully begotten; and this they are ready to verify; whereupon they pray judgment and seisin of the third part of the tenements aforesaid, with the appurtenances whereof, &c. in Gosfield aforesaid, to be adjudged to them, &c. And the aforesaid Edward and Margaret say, that the aforesaid plea of the said Thomas Lawrence and Marcia

Z. entered into the said tenements in G. and was seised for life.

At the death of T. M. the husband, Z. was within age.

The said M. whilst single, as guardian, and for nurture of said Z., entered into the said tenements in G.

Afterwards and before the making the release, it was agreed between the said M. whilst she was single, and the said T. N. the son, that the said M. should release her dower in all lands in W. and that the said T. N. the son should enfeof, &c.

M. made the said release.

[* 150 a.]

T. N. the son, enfeofed, &c.

Afterwards Z. died without heir of his body, &c.

Demurrer.

Joinder.

*Curia advisare
vult.*

pleaded in manner and form aforesaid in reply, and that the matters therein contained are not sufficient in law, for them the said Thomas and Marcia, the dower of the said Marcia, in the tenements aforesaid, with the appurtenances, whereof, &c. against the said Edward and Margaret, to have and maintain: and that they need not nor by the law of the land are bound thereto to answer; and this they are ready to verify; wherefore, for default of a sufficient replication of the aforesaid Thomas and Marcia, in this behalf the said Edward and Margaret, as before pray judgment, and that the said Thomas Lawrence and Marcia, from the dower of the said Marcia, of the tenements aforesaid, with the appurtenances, whereof, &c. against them ought to be barred. And the said Thomas and Marcia, forasmuch as they sufficient matter in law, for the said Thomas and Marcia, to have and maintain their action aforesaid, against the said Edward and Margaret above, by replication have alleged, which they are ready to verify, which matter the said Edward and Margaret do not deny, nor to the same any ways answer; but the averment aforesaid do altogether refuse to admit, as before, pray judgment and seisin of the third part aforesaid to be adjudged unto them, &c. And because the Justices here will advise themselves of and upon the premises, before they give their judgment thereof, day is given to the parties aforesaid here, until in eight days of St. Michael, to hear their judgment thereof, because the said Justices here thereof, are not yet, &c.

[150 b.]

EDWARD ALTHAM'S CASE,

Mich. 8 Jacobi 1.

In the Common Pleas.

LAWRENCE
v.
ALTHAM.
P.VIII.—150 b.

A man seised in fee of lands in G., and lands in W., made his will, by which he devised his lands in G. to his younger son Z. for life, and died leaving a widow, and T. N. his son and heir, and Z. his younger son, an infant of the age of three years. The widow entered into the lands in G., as guardian in nurture to Z.; and whilst in possession released to T. N. "*all and all manner of actions, as well real as personal, suits, quarrels, and demands whatsoever, as also all her dower and title, and action of dower in the lands in W., what or which she ever had or has, &c. against the said T. N.*" Z. died without any heir of his body: T. N. died, leaving M. his daughter and heir, who married E. A. The widow and her second husband brought a writ of dower to be endowed of the lands in G. against M. and E. A. her husband; and judgment was given for the demandants.

The release of all actions real to T. N., having but a reversion expectant on a freehold, did not extinguish the dower: but if the release had been of all her right, the dower would have been extinct.

Where a man has several means of coming to his right, he may release one of them specially, and yet take benefit of the other. But when he can only come to his right by way of action, a release of all actions destroys his right.

A release of all actions is not a release of executions; but it is a release of a *Scire facias*.

By a release of all actions real and personal, such actions only are released in which the plaintiff should recover any thing in the realty or personally, which is due to him.

In some cases by a release of all actions a debt or duty is barred, although no action at the time of the release given, lies for the debt. The word *quarrels* extends to actions real and personal, and to causes of actions and suits.

By a release of all actions, actions depending and causes of action are released.

By a release of all suits, executions are barred.

The meaning of the word *title*.

A release of suits is larger and more beneficial than a release of quarrels, or of actions: but a release of all demands is the most advantageous to the releasee.

In the principal case, by the release of all demands to him in the reversion, if the deed of release had not gone farther, the dower of the widow would have been barred.

The first words in the release, as well as the subsequent special words, extend only to the lands in W.

A deed set out in pleading cannot be contradicted by averment of matter not contained in the said deed. S. C. 1 Brownl. 62.

THOMAS LAWRENCE, and Marcia his wife, brought a writ of dower against Edward Altham, and Margaret his wife, and made demand to be endowed of the third part of 100 acres of land, 10 acres of meadow, and 60 acres of pasture, with the appurtenances, in Gosfield, in the county of Essex, as the dower of the said Marcia, of the endowment of Thomas Nash the elder, her late husband: the tenants pleaded in bar, that the said Thomas Nash was seised of the tenements aforesaid in fee, and held them in socage; and afterwards 10 Aprilis, 1592, by his will in writing, devised the said tenements, whereof, &c. to Zachary Nash, his younger son, for the term of his life, and afterwards died thereof seised, after whose death the said Zachary entered, and was thereof seised for the term of his life; and the reversion of the said tenements descended to Thomas Nash, son and heir of the said Thomas the husband, and afterwards the said Marcia one of the demandants in her widowhood, when she was sole, *scil.* 27 Aprilis, 35 Eliz. by her deed did remise, release, and for her, her heirs, executors, and administrators, for ever quit claim to the said Thomas Nash the son, *omnes et omnimodas actiones, tam reales quam personales, sectas, que-*

10 Co. 51 a.
Com. Dig. Release.
Bac. Ab. Release.
Vin. Ab. Release.
Touch. Release.

[* 151 a.]

relas et demanda quæcunque quæ ipsa Marcia vel executores sui versus præfat' Thomam Nash filium vel executores suos unquam habuisset seu habuissent, tunc habuit vel habuerunt seu quovismodo tunc in futurum habere potuisset vel potuissent, ratione alicujus rei, causæ vel facti cujuscunque ab origine mundi usque diem dat' ejusdem scripti relaxationis: and afterwards the said Thomas the son died seised of the said reversion, after whose death it descended to the said Margaret, wife *of the said Edward Altham, the other of the tenants, and afterwards the said Zachary died, and the said Margaret entered, &c. And the demandants demanded oyer of the said deed, which was read to them in these words, *Omibus Christi fidelibus ad quos, &c.* as in the record here before at large. And the demandants replied and said, that the said Thomas Nash the father was seised in his demesne as of fee, as well of the tenements, whereof, &c. in G. aforesaid, as of two messuages, and 200 acres of land in Wethersfield aforesaid, and by his will in writing devised the said tenements, whereof, &c. in G. to the said Zachary Nash, as is aforesaid, and afterwards died: after whose death the said Thomas Nash, the son, entered into the said tenements in Wethersfield, as his son and heir, and was seised thereof in fee, and the said Zachary entered into the said lands in Gosfield, &c. And that the said Zachary was, at the time of the death of the said Thomas the father, of the age of three years, wherefore the said Marcia, as guardian in nurture, entered into the said tenements in G. and that afterwards, and before the said release, it was concluded and agreed by the said Marcia, when she was sole, and the said Thomas Nash the son, that the said Marcia should release to the said Thomas Nash the son, all her dower of the tenements in Wethersfield aforesaid, &c. and that the said Thomas the son so seised of the tenements in Wethersfield, and the said Marcia so possessed of the tenements in G. she made the said release, &c. and afterwards the said Zachary died, &c. upon which the tenants demurred in law. And in this case two questions were moved and argued at the bar and bench. The first was, whether the said release made by the wife to him in reversion expectant on an estate for life should extinguish her (a) dower? the 2d, whether the said foreign concord and agreement of the parties should qualify the force of any of the words of the release? As to the first, the said deed of release was divided into three parts; in the first was considered the words of the release; in the second the words of qualification; and in the third, the words of relation. As to the words of the release, they appear to be of two sorts, the one general, the other special: the general contains four words, *actiones, sectas, querelas, et demanda:* the special contains three, *dolem, titulum, et actiones dotis:* the words of qualification are, *mihi contingent' per mortem dicti Thomæ nuper viri mei, de aliquibus terris et tenementis suis in W. præd'.* The words of relation, or relative words, are, *quæ vel quas ego præfat' Marcia vel executores mei versus ipsum Thomam, &c., unquam habui, habeo, seu quovismodo in futurum habere potero*

(a) 1 Co. 112 b.
Co. Lit. 265 a.
5 Co. 71 a.
16 E. 3. Bar.
245. Postea
151 b. 154 a.
Doct. Pl. 149.

Ante 149 a.

ratione alicujus rei, &c. As to the first word (*actiones*) it was resolved, that in this case, the release of all actions real to Thomas the son, having but a reversion expectant on a freehold, did not extinguish the dower, because (a) *actio est jus prosequendi in judicio quod alicui debetur*, as it is *described in (b) Dyer 4 and 5 Ph. and Mar. † 217. out of Bracton, *lib.* 3. cap. 1. And the wife cannot sue Thomas the son, to recover her dower by judgment, because he is not tenant to the *præcipe*, nor can he render dower to her, for at the time of the release, Zachary was tenant of the freehold, and Litt. Release, fol. 115. holds, that in actions real, which (c) ought to be sued against the tenant of the freehold, if the tenant has a release of actions real of the demandant made to him before the writ purchased, and he pleads it, it is a good plea for the demandant to say, that he who pleads the plea had nothing in the freehold at the time of the release made, for then he had no cause to have any action real against him.

El. Dyer 207. (b) 4 and 5 Eliz. Dyer 217. pl. 2. Moor 34. Postea 153 b. 1 And. 8. 5 Co. 71 a. N. Benl. 126. pl. 190. Co. Ent. 115. pl. 5. (c) Lit. sect. 495, 405. Co. Lit. 286 a. Lit. fol. 116 a.

And therefore Coke, Chief Justice, said, the opinion in 14 Hen. 6. 11 a. was of great difficulty, *scil.* If one releases to him in the reversion expectant on an estate for life all actions real, and afterwards tenant for life is impleaded, and prays in aid of him in reversion, or vouches him, or he is received in these cases (as it is there said) although *præcipe* be not begun against him, yet forasmuch as by the receipt or voucher he is become tenant to the *præcipe* of him who made the release, and shall be bound by the judgment, he shall have advantage to plead the release of all actions real: but the doubt is, because, at the time of the release made, he had no cause (as Litt. saith) to have any action against him: but doubtless, after receipt or entry into the warranty by the voucher, a release by the demandant to the tenant by receipt, or the (d) vouchée, is good, because both, at the time of the release made, were tenants in law to the demandant, but a release to them by any stranger is not good: *vide* 7 Ed. 3. 46. 18 Ed. 3. 12. 8 H. 4. 5 a. 7 Ed. 4. 13 b. 20 H. 6. 29. 22 H. 6. 12. 5 H. 7. 41 a. Lit. 114 b. *lib.* 1. in my Reports, fol. 87. and *lib.* 3. fol. 29. But if the wife had released *totum jus*, all her right to him in the reversion, her (e) dower had been extinct, because her dower would accrue to the demandant, not only out of the estate for life, but also out of the reversion, and that was affirmed for good law, as well at the bar by both parties, as at the bench, according to the book of (f) 16 Ed. 3. cited in Hoe's case, in the fifth part of my Reports, fol. 70, 71 a.

191. fol. 115 b. Co. Lit. 265 b. 266. a. 284 b. 10 Co. 48 b. 9 H. 7. 26 a. 7 E. 4. 13 b. 2 Roll. Rep. 323. Br. Release 9, 13, 53. 20 H. 7. 10 a. (e) Antea 151 a. 1 Co. 112 b. Co. Lit. 265 a. 5 Co. 71 a. 16 E. 3. Fitz. Bar. 245. Postea 154 a. Dost. pl. 149. (f) Fitz. Bar. 245.

For when the right, which is the foundation and principal, is released, by consequence the action which is but the mean to recover it, *i.e.* *jus prosequendi*, is also released; and that appears in 9 Hen. 6. 47. 10 H. 4. 6. 21 H. 7. 23. 19 H. 6. 4. and therefore *jus* is well divided in Plow. Com. in Nichols's case 487 b.

The release of all actions real to T. N. having but a reversion expectant on a

[* 151 b.] freehold, did not extinguish the dower: but if the release had been of all her right, the dower would have been extinct.

(a) Co. Lit. 285 a. Dyer 217. pl. a. 10 Co. 51 b. Postea 152 a. 2 Inst. 40.

† See 4 and 5

Query, whether the reversioner being vouched &c. by tenant for life can plead a release made to him before the tenant for life was impleaded.

If the release had been of all her right, the dower would have been extinct.

(d) 3 Co. 29 b. Hob. 222. 1 Co. 87 b. Lit. sect. 2 Roll. Rep.

(a) Co. Lit. 345 b.
Jus est sextiplex.

(b) 4 Co. 63 a.

[* 152 a.]

Where a man has several means of coming to his right, he may release one of them specially, and yet take benefit of the other. But when he can only come to his right by way of action, a release of all actions destroys his right.

(c) Co. Lit. 286 b. 4 Co. 63 a. Lit. sect. 495. Sect. 498. fol. 116 a. b.

(d) Co. Lit. 286 a.

(e) Co. Lit. 285, 286 a.

(f) Co. Lit. 275 b. 285 b.

Co. Lit. 264 b.

(g) 10 Co. 67

b. 6 Co. 64 a.

2 Roll. Rep.

315. Hutt. 18.

2 Siderf. 59.

Co. Lit. 234 a.

(A) Co. Lit. 338

a. 6 Co. 69 b.

(i) 2 Co. 25 b.

5 Co. 100 a.

9 Co. 123 b.

Co. Lit. 10 a.

143 a. 166 b.

174 b. 271 b.

A release of

all actions is

not a release of

executions, but

it is a release

of a *Scire facias*.

(k) Co. Lit. 285 b.

(l) 10 Co. 51 b.

(m) Antea 151 a.

Co. Lit. 285 a.

Dyer 217. pl. 2.

10 Co.

51 b. 2 Inst. 40.

(n) Co. Lit. 289 a.

(o) Post. 153 a.

(p) Co. Lit. 290 b.

Lit. sect. 504, 505.

Br. Scire fac. 188.

Br. Release 57.

Comb. 445.

Skin. 682.

2 L. Raym. 1048.

2 Wils. 251.

where it appears that *Jus est sextiplex, scil.* 1. (a) *Jus recuperandi, i. e. prosequen'*: 2 *Jus intrandi*: 3. *Jus habendi*: 4. *Jus retinendi*: 5. *Jus percipiendi*: 6. *Jus possidendi*: and therefore when a man releases *totum jus* generally, all his rights are thereby released. But if the (b) disseisee released to the disseisor *omnes action'* i. e. *jus recup' sive prosequen' in judic'* his right of entry is not *thereby released: for when a man has (c) divers means to come to his right, he may release one of them specially, and yet take benefit of the other; and therewith Littleton agrees, fol. 115 b. and 12 Ass. pl. 3. 19 H. 6. 4. 21 H. 6. 23. 21 H. 7. 23. But when a man has not any means to come to the land (d) but by way of action, there, if he releases all actions, thereby his right inclusive, by judgment of law, is gone, because by his own act he has barred himself of all means and remedies to recover or attain to it: for a release of all advantages upon the account is a good bar in an action of debt upon the account, 9 Ed. 4. 49. And therefore if the disseisee releases all actions (e) to the heir of the disseisor, thereby his right in judgment of law is gone. But if the heir of the disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the (f) tenant for life all actions which he has against him, and afterwards tenant for life dies; the disseisee, notwithstanding this release, shall have an action against him in remainder, for he releases but the action; and the act in law never extends the act of the party farther than his express words, as if the lord disseises his tenant, and makes a lease for life, this release in law shall be but for the life of the lessee; for it is true, that (g) *fortior et potentior est depositio legis quam hominis*, and so it is true, that, (h) *fortior et æquior est depositio legis quam hominis*. (i) *Ipsæ etiam leges capiunt ut jure regantur*. But if the disseisee releases all actions to the disseisor, and afterwards the disseisor dies seised, (k) and afterwards the disseisee dies, there, a right descends to the heir of the disseisee; because, notwithstanding the release, a right remained. Vide (l) 21 Hen. 6. 1. the opinion of Newton: and it was observed, (m) *actio est jus prosequendi in judicio*; and therefore by the (n) judgment, the action is determined, for the judgment is the end of the action (*jus prosequendi in judicio*) and therefore a release of all actions is no bar (o) of executions; and therewith agrees 26 Hen. 6. Execution 7. and Br. Releases 87. and 19 Hen. 6. 4., and Litt. 116 b. But in a (p) *Scire facias* grounded upon a judgment, a release of all actions is a good plea (A) because he shall have a new

(A) A *Scire facias* is considered in law as an action, for the defendant may plead to it. And every writ whereunto the defendant may plead, be it original or judicial, is in law an action, Co. Lit. 291 a. Pulleney v. Townson, 2 Black. 1227. *Grey v. Jones*, 2 Wils. 251. *Fenner v. Evans*, 1 T. R. 267. *Winter v. Kretchman*, 2 T. R. 46. Vid. Tidd's Practice, Chap. *Scire facias*, and note (4) *Underhill v. Devereux*, 2 Saund. 71 a.

judgment; and therefore there it may well be called *jus prosequendi in judicio*, and therewith agrees 18 E. 4. 7 b. Then the words farther are, *quod alicui debetur*, i. e. which is due to any, so that by release of all actions, (a) real and personal, such actions are only released in which the plaintiff should recover any thing in the realty or the personality which is due to him, which is included in these words, *quod sibi debetur*. And therefore if a man is outlawed in a personal action by process upon the original, and brings a writ (b) of error, and he pleads against him a release of all actions personal, that is no *plea: for by the said action he shall recover nothing that is due to him, but he shall only reverse the outlawry to discharge himself of that disability. So that the said writ of error doth not agree with the said description of an action; for it is not (c) *jus prosequendi in judicio quod sibi debetur*: but in such a case a release of writ of error is a good plea; and therewith Littleton agrees, 116 b. and the book in (d) 11 H. 4. 6 a. b. where the case was, Trescullard brought a writ of error against T. son and heir of John Penros, upon a judgment against him in a writ of redisseisin, at the suit of the said J. Penros, and also of an outlawry thereupon against him pronounced for that cause; and assigned two errors: one, because the sheriff took the inquest in the town, and not on the land, according to the statute. 2. Because the sheriff made a precept to a bailiff to summon the jury, who returned a pannel, which was removed hither as parcel of the record, and the sheriff took the inquest by some who were not returned by the bailiff. And there Huls, as to the first error, said, if the sheriff cause the jury to view the waste, he may take the inquest at another place, so here. And as to the second error, he said, that the sheriff may vary from the return of the bailiff; for the sheriff himself is the person who makes the array, who is also a judge in the case. Gascoign, If the sheriff had not made the precept, and the return by the bailiff had not been made parcel of the record, it would be as you say; but he has sent this return as parcel of the record, whereby he affirms the return of the bailiff; and if he had process against the jury by *Habeas Corpus*, and had taken the inquest by others, it is error, *quod Huls concessit*; and Rolfe of counsel with the defendant in the writ of error pleaded, that the plaintiff should not be received to assign error, for after the judgment the plaintiff in the writ of error, by his deed which is here, released to the said John Penros, who recovered in the writ of redisseisin all his right in the land, and all actions and demands; and although both the errors were assigned in the principal record, and thereof by the said release he is stopped to assign error; and although the outlawry was good in process, yet because the record and judgment are the original of the process of the outlawry; therefore if there be defect in the original judgment, the outlawry which is depending upon it is reversible, by Gascoigne, *quod Huls affirmavit*: wherefore he reversed the outlawry, notwithstanding the release. Which judgment agrees

By a release of all actions real and personal, such actions only are released in which the plaintiff should recover any thing in the realty or personality which is due to him.

[*152 b.]

(a) Co. Lit. 288 b.

(b) Co. Lit. 288 b. Lit. sect. 503.

(c) Co. Lit. 288 b. Lit. 117 b. Lit. sect. 503.

Trescullard v. T. son and heir of John Penros. A release of all actions and demands is no bar to the reversal of an outlawry for error.

(d) Postea 154 a. Fitz. Error 64. Antea 143 a. Br. Error 47.

with Littleton, and is worthy observation in the principal point of judgment.

The plaintiff releases to the defendant, then in execution, the debt and all executions, and the defendant releases to the plaintiff all actions; the defendant is not barred of his *audita querela*. (a) Co. Lit. 289 a.

[* 153 a.]

(b) Lit. s. 504.
Co. Lit. 289 a.

In some cases by a release of all actions, a debt or duty is barred, although no action at the time of the release given, lies for the debt.

On a personal contract to pay money at several days, debt does not lie till all the days are incurred; but for rent, on a lease of land, payable at different days, debt lies after each day.

(c) Cro. El. 370.
(d) Co. Lit. 285 a.

(e) 1 Brown. 62, 65. 5 Co. 79, 81 b. Co. Lit. 47 b. 10 Co. 128 b. 2 Leon. 108. Owen 42. Cr. El. 118, 119. 3 Co. 22 a. 1 Roll. Rep. 221. (f) Lit. s. 513. Co. Lit. 292 b. Lit. 118 b. (g) Dyer 113.

pl. 55, 56. (A) Br. Action sur le Case 108. 1 Leon. 300. (i) Co. Lit. 47 b. F. N. B. 130 h. 1 Roll. Rep. 221. Co. Lit. 292 b. Cr. Jac. 505. 10 Co. 128 b. 2 Inst. 395. F. N. B. 267 b.

So if the body of a man condemned in debt be in execution, and the plaintiff releases the debt, and all executions, and the defendant releases to the plaintiff all actions, yet upon the release of the plaintiff he shall have an (a) *Audita querela*; for thereby he shall recover nothing, but discharge his body of imprisonment.

* But if the plaintiff after judgment releases to the defendant all actions, and afterwards his body is taken in execution, he shall not have an *Audita querela* thereupon, for (b) an execution is no action, as has been said before; and therewith agrees 13 H. 4. Release 53.

Also it was observed, upon these words (*quod alicui debetur*) that in some case a debt or (c) duty shall be barred by a release of (d) all actions, although no action at that time lies for the debt: as if a man be bound to another in a certain sum, to be paid at the feast of St. Michael next following, if the obligee before the feast releases to the obligor all actions, he shall be barred for ever of the duty, for it is *debitum* presently, although it be not presently *solvend*; and therefore if one be bound to another in 40*l.* to be paid at four usual feasts of the year, and three of the feasts are past, in that case for 30*l.* there is *debitum* and *solvend*; also, and yet the obligee shall not have an action of debt (b) till the last feast be past; and notwithstanding that, a release of all actions before the last feast discharges all: (c) but if a man leases land to another for the term of a year, rendering 40*l.* rent, to be paid at the four usual feasts by equal portions, in this case if one feast be past, he shall have an action of debt presently, and shall not tarry till all the days be past, for there, the duty accrues upon the receiving of the profits of the land, and till the feast incurred in which it is to be paid, there is neither *debitum* nor *solvend*, and therefore there a release of all actions before the feast is no bar, but in respect of the several perception of the profits of the land, the rent after every feast is demandable by action of debt: and so *stude causam diversitatis* made in (f) Litt. 117. (which was never added by Littleton himself) is well explained. And therewith agree 7 Hen. 6. 26 a. 45 Edw. 3. 8 a. L. 5 Edw. 4. 41 b. 13 Hen. 4. Avowrie 240. Vide 3 Ma. Dyer (g) 113. 5 Ma. (h) Dyer 108. upon *Assumpsit* or covenant in which damages are to be recovered, an action lies after the first day, and F. N. B. 267. and 16 E. 3. *Fieri fac* 4. that upon (i) a recognizance which is a judgment

(n) This must be understood of a single bond; for in the case of a bond with a condition to pay money on several days, on de-

fault to pay on the first day, the bond would be forfeited. Touch. 388. Vid. note (a) *Walker's case*, Vol. II. p. 59.

in law, execution lies after the first day, and so all the books are well reconciled and agree: wherefore it was concluded in the case at bar, that by the release of all actions made to him in reversion the dower of the wife was not barred, because at the time of the release she had no cause of action against him.

As to this word (*Querelas*) (*a*) it is to be known that quarrels extend not only to actions as well real as personal, as it is held in 9 E. 44 a. but also to (*b*) causes of actions and suits, as it is held in 39 H. 6. 9 b. So that by release of all quarrels, not only actions depending in suit, but causes of action and suit also are released.

The word quarrels extends to actions real and personal, and to causes of actions and suits.

(*a*) Co. Lit. 292 a. Lit. sect. 511. (*b*) Co. Lit. 292 a.

And so it is where one releases to another all actions, not only actions depending, but also (*c*) causes of (*d*) *actions, are released. *Vide* 35 H. 8. 57. 4 and 5 Eliz. (*e*) 217 b. Trin. 4 Eliz. Rot. 1027, &c. And this word *querela* is derived a *querendo*, unde etiam *querens* who is the plaintiff, and quarrels, controversies, and debates, are (*f*) *synonima*, and of one and the same signification.

By a release of [*153 b.] all actions, actions depending and causes of action are released.

(*c*) Co. Lit. 285 a.

(*d*) 10 Co. 51 b. Dyer 57 n. b. Co. Lit. 285 a. (*e*) 1 And. 8. 4 and 5 Eliz. Dyer 217. pl. 2. 5 Co. 71 a. N. Benl. 126. pl. 190. Co. Ent. 115. pl. 5. Ante 151 b. Moor 34. (*f*) Co. Lit. 292 a.

And for this word (*sectas*) it is to be known that by release of all (*h*) suits, executions are barred, for none shall have execution without suit or prayer; and therewith agree 9 Hen. 6. 4. 26 Hen. 6. Execution 7. and Br. Releases 87. So by release of all (*i*) duties, as well executions as actions are released: but a release of suit or quarrel is not in this case any bar of dower, no more than by a release of them, a (*k*) covenant before the breach thereof is released, because the covenantee has no cause of action or suit before the covenant broken.

By a release of all suits, execution is barred.

(*h*) Co. Lit. 291 a. 2 Roll. 404. 26 H. 6. Fitz. Execut. 7.

(*i*) 2 Roll. 404. Fitz. Execut. 7. Co. Lit. 291 a.

(*k*) Co. Lit. 292 b. 5 Co.

21 a. 1 Co. 112 b. 2 Roll 404. 10 Co. 51 b. Cr. Jac. 170. Moor 34. Hutt. 17. 1 Anders. 8. Poph. 136. Lit. Rep. 87. Yelv. 156.

As to this word (*l*) (*titulum*) (which is mentioned in the particular clause) it has two significations, one properly and strictly, as for a title for which no action lies, as for a condition broken, or upon alienation in mortmain, &c. and so it is taken in Plowden's Commentaries, in Nichol's case, fol. 484. In another signification it is taken largely; and in this sense, *titulus est justa causa possidendi quod nostrum est*, and signifies, the title which one has to land, as by fine, feoffment, &c. or by descent, &c., and therefore when the plaintiff makes a title in an assize, the tenant may say, let the assize come upon the title, which is as much as to say, upon the particular conveyance, &c. which he makes to the land, &c. and it is called (*n*) *titulus a tuendo*, quia thereby he defends his land, et *plerumque constat ex munimentis quæ nuntiant et tuentur causam*. By release of all title to land, &c. all his right is extinct, for it shall be taken strongly against him, and in the largest sense. So when a man has title in the proper sense, (*o*) either by a condition or by alienation in mortmain, the release of all his right will ex-

The meaning of the word title.

(*l*) Co. Lit. 345 b. 292.

(*n*) Co. Lit. 345 b.

(*) *Id.*

(*o*) *Id.*

(a) 1 Brown.
63.

Releases of
demands, the
best release.

There are two
manner of de-
mands, viz. in
deed and in law.

(b) 1 Brown.
63, 80, 115.

[* 154 a.]

Co. Lit. 291 b.

Lit. sect. 508.

Bridgm. 124, 125.

3. 48 a. 34 H. 8.

Br. Release 90.

Yelv. 156, 214, 215.

Hob. 216.

Noy. 26.

Hutt. 17.

1 Bulst.

178. Cro. Eliz. 552.

Lit. Rep. 87.

11 Co. 82. b.

(c) 1 Brown. 63.

(d) Co. Lit. 291 b.

A release of

suits is larger

and more be-

neficial than a

release of quar-

rels or of ac-

tions: but a re-

lease of all

demands is the

most advanta-

geous to the

releasee.

(e) 1 Brown.

63.

(f) Cr. Jac.

487. Bridgm.

124 b. Co.

Lit. 291. 1

Brownl. 63.

2 Roll. 407.

(g) 1 Brown.

63. Cro. El.

40. Lit. sect.

508.

(h) 11 Co. 82 b.

Co. Lit. 292 a.

40 E. 2. 22.

L. 5 E. 4. 41,

42.

(i) Co. Litt.

392 b. Litt.

171 a. Litt. s.

748. (k) 1 Co. 112 b.

5 Co. 71 a.

In the princi-

pal case by the

release of all

demands to

him in the

reversion if

the deed of release had not gone farther, the dower of the widow would have been barred.

(j) 1 Co. 112 b.

5 Co. 71 a.

Antea 151 a. b.

Co. Lit. 265 a.

16 E. 3.

Fitz. Bar. 245.

Doct.

pla. 149.

tinguish this title, for he has *jus possidendi*, and therewith agrees 6 Hen. 7. 8 a. And the English poet saith, "For true it is that neither (a) fraud nor might can make a title where there wanteth right." The last of the four general words in the deed is (b) (*demanda*) *quod est vocabulum artis*: and if one releases to another all demands, it is (as Littleton saith, 117 a.) the best release to him to whom the release is made, that he can have, and shall enure most to his advantage; for thereby not only all demands, but also all (c) causes of demand, are released. And there are (d) two manner of demands, *scil.* in deed, and in law; in deed, as in every *Præcipe* there is an express demand; and thereupon in real actions he is called demandant; in law, as every entry into land, distress for rent, taking or seizure of goods, and the like acts *in pais*, which may be done without any words, *are demands in law.

Poph. 136. 2 Rol. Rep. 20. Cr. Jac. 170, 300, 486, 487. 2 Roll. 406, 407, 408. Bridgm. 124, 125. 20 Ass. 5. Fitz. Release 39. Br. Release 36. Long. quinto E. 4. 42 a. 40 E. 3. 48 a. 34 H. 8. Br. Release 90. Yelv. 156, 214, 215. Hob. 216. Noy. 26. Hutt. 17. 1 Bulst. 178. Cro. Eliz. 552. Lit. Rep. 87. 11 Co. 82. b. (c) 1 Brown. 63. (d) Co. Lit. 291 b.

And as a release of suits is (e) larger and more beneficial than a release of quarrels, or of actions; so a release of demands is more large and beneficial than any of them, for thereby is released all that is by the others released, and more: by release of all demands, all freeholds and inheritances executory are released, as (f) rents, and the like, 20 Ass. p. 5. 14 Hen. 8. 9, 10. By release of all demands, all (g) executions are released, 26 Hen. 6. Execution 7. 19 Hen. 6. 4. Litt. 117. 40 Edw. 3. 51. By release of all demands to the dis- seisor, the right of entry to the land, and all that is contained in it, is released, 6 Hen. 7. 15. So it is resolved by all the Justices in (h) Chauncey's case, 34 Hen. 8. Br. Release 90. that he who releases all demands excludes himself from all actions, entries, and seizures. Litt. cap. Warranty 170 a. holds, that if tenant in tail enfeoffs his (i) uncle, who enfeoffs another in fee with warranty, if afterwards the feoffee by his deed releases to his uncle all manner of warranties, or all manner of real covenants, or all manner of demands, by such release the (k) warranty (which is a covenant real and executory) is extinct: and the reason of all this was, because by release of demands all the means and remedies, and the causes of them, which any one has to lands, tenements, goods, chattels, &c. are extinct; and by consequence the right and interest itself to the thing.

Wherefore it was resolved, that in the case at bar, by the release of all demands to him in the reversion, if the deed of release had not gone farther, the (l) dower of the said Marcia had been barred.

In the principal case by the release of all demands to him in the reversion if the deed of release had not gone farther, the dower of the widow would have been barred.

(j) 1 Co. 112 b. 5 Co. 71 a. Antea 151 a. b. Co. Lit. 265 a. 16 E. 3. Fitz. Bar. 245. Doct. pla. 149.

Note, Reader, although a release of all demands be of so great extent, yet it doth not extend to such writs by which

nothing is demanded neither in fact nor in law, but lie only to relieve the plaintiff by way of discharge, and not by way of demand, as appears before, by the judgment in (a) Tresculard's case, in 11 Hen. 4. 6. where a release of all demands is no bar in a writ of error to reverse an outlawry, *et sic in similibus*. Vide 40 Edw. 3. 22. 13 Rich. 2. A'vowry 39 (89.) 18 Edw. 3. 59. 14 Hen. 4. 4., &c. where by release of all demands, future (b) incidents are released, and where, not. And vide Plowden's Commentaries 484. in Nichol's case for this word (*interesse*).

Now as to the second part of the deed, *scil.* to the words of qualification, it was resolved that as well the first words as the subsequent words special, extend only to release all actions, suits, quarrels, demands, title and dower, &c. *de aliquibus terris et tenementis suis in Wethersfield*, (c) and not to any lands and tenements in Gosfield; for the said latter words, *mihi contingent' per mortem dicti Thomæ*, &c. qualify the said general words, and restrain all the first words to the lands or tenements in Wethersfield, *and that for three reasons:—1. Because all the said three parts of the deed, *scil.* the words of release, the words of qualification, and the words of relation, are but one period and one sentence; for this conjunction (*necnon*) conjoins the general words to the words of qualification, and the relative words refer to all the words, as (d) well general as special, and also to the words of qualification, as shall hereafter appear, and therefore the whole is but one and the same sentence. 2. If the general words shall stand without any qualification, then the special words would be altogether vain and of no effect, *et* (e) *maledicta expositio est quæ corrumpit textum*.

The third and the principal reason is upon a maxim and principle of the law, *scil.* (f) *quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia*. The same rule almost word for word is put and agreed on both sides in 7 Ed. 3. 10 a. Margery (g) Mortimer's case, *sc.* "where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words;" as if a man grants a rent *in manerio de D' percipiend'* in 100 acres of land, parcel of the same manor, with clause of distress in the 100 acres, the rent shall issue out of the 100 acres only, and the general words shall be construed according to the special words: so it is there also said, if a man grants a rent, (and goes no farther) these (h) general words shall create an estate for life, but if the *habendum* be for years, it shall qualify the general words; and all this appears

(a) Ante 152 b.

(b) 1 Brown. 63.

The first words in the release, as well as the subsequent special words extend only to lands in W.

(c) 3 Keb. 580.

[* 154 b.]
The reasons thereof.

(d) Wing. Max. 15.

"Where a deed speaks by general words and afterwards descends to special words, if the special words agree with the general words, the deed shall be intended according to the special words."

Grant of a rent in the manor of D. to be taken in 100 acres, parcel of the same manor, with clause of distress in the 100 acres, the rent issues out of 100 acres only. Grant of a rent *habendum* for years, the *habendum* qualifies the general words, &c. Grant to A. and his heirs, *habendum* to him and the heirs of his body, is an estate tail.

(e) 1 Roll. Rep. 319. Wing. Max. 26. 2 Co. 24 a. 4 Co. 35 a. 8 Co. 56 b. 3 Bulst. 105, 107, 108. (f) Winch. 92. 2 Roll. Rep. 279. (g) Lit. Rep. 345. Hob. 172. (h) 2 Co. 24 a. 54 a. Winch. 92. Perk. sect. 167, 174. Co. Lit. 186 a. 190 b.

But a grant to one and the heirs of his body, *habendum* to him and his heirs, is an estate tail with a fee simple expectant; for where a deed at first contains special words, and then concludes in general words, both

words, general and special shall stand.

(a) 3 Roll. 66, 68. Godb. 272. 2 Sid. 78. Lit. Rep. 260. Perk. sect. 170. 1 Brown. 45. Co. Lit. 21 a. Dyer 126. pl. 50. 1 Sid. 78. 3 Bulst. 195. (b) Lit. Rep. 345. Co. Lit. 21 a. 2 Jones 4. (c) Ante 118 b. Raymond 330. Hawk's Max. 21. Styles 301. 2 Roll. Rep. 279. Lit. Rep. 345. 4 Co. 80 b. Hard. 108. 1 B. and B. 131, 176. 2 B. and B. 540. (d) Co. Lit. 299 a. 1 Sid. 137. Dyer 56. pl. 21.

The relative [* 155 a.] words *quæ vel quas*, refer as well to the words "actions, &c. and demands," as to the special words.

A collateral averment out of a deed is of no force or effect in law. Examples, &c.

(e) 9 Co 13 a. 25 a. 11 Co. 10 b. 2 Bulstr. 204, 251, 305, 314. 1 Sid. 127. Co. Lit. 125 a. 226 a. 1 Roll. Rep. 132.

in the said book of 7 Ed. 3. So if a man (a) gives land to one and his heirs, *habendum* to him and the heirs of his body, he shall have but an estate in tail, and no fee expectant (c); for the *habendum* qualifies the general words precedent; and therewith agree 35 Ass. p. 14. 37 Ass. p. 5. and Perkins 35 b. against the opinion *obiter* in 21 Hen. 6. 24. But if a man gives lands in the premises to one and (b) the heirs of his body, *habendum* to him and his heirs, he has an estate tail, and a fee-simple expectant; for that stands upon another rule or principle in law, *scil.* (c) *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa*: and therefore when the deed at the first contains special words, and afterwards concludes in general words, both words as well general as special shall stand; and it is well said in 35 H. 8. Dyer 56. subsequent words may qualify and (d) abridge, but not destroy, the generality of the words precedent (d). *Vide* Dyer 33 H. 8. fol. 50. 21 Ass. p. 10. and 2 E. 3. 33 b.

(a) 3 Roll. 66, 68. Godb. 272. 2 Sid. 78. Lit. Rep. 260. Perk. sect. 170. 1 Brown. 45. Co. Lit. 21 a. Dyer 126. pl. 50. 1 Sid. 78. 3 Bulst. 195. (b) Lit. Rep. 345. Co. Lit. 21 a. 2 Jones 4. (c) Ante 118 b. Raymond 330. Hawk's Max. 21. Styles 301. 2 Roll. Rep. 279. Lit. Rep. 345. 4 Co. 80 b. Hard. 108. 1 B. and B. 131, 176. 2 B. and B. 540. (d) Co. Lit. 299 a. 1 Sid. 137. Dyer 56. pl. 21.

To the last part of the deed, *scil.* the relative words (*quæ vel quas*, &c.) it was resolved, that they *refer as well to actions, &c. and demands, as to the special words, for it would be against reason that they should refer to general words, which are more remote, and not to the words of qualification which are immediate and next to them: and that is so clear and perspicuous of itself that it is not worthy of any argument, or proof, to confirm it. For the second point of the case it was resolved, that the said foreign or collateral averment out of the said deed was not of any force or effect in law; for every deed consists upon two parts, *scil.* matter of fact, and upon the construction in law. Matter of fact is to be averred by the party, and triable by the jurors: the other, being matter in law, is to be discussed by the judges of the law, and *quemadmodum* (e) *ad questionem facti non respondent iudices; ita ad questionem juris non respondent iuratores* (e). And therefore if A. levies a fine to William his son, to have

(c) In *Turnham v. Cooper*, Cro. Jac. 476. S. C. 2 Roll. Rep. 19, 23. S. C. Popham 138. such words were held to pass a fee tail and a fee simple expectant. In the case there were several circumstances to indicate an intention to pass a fee, for there was a reservation of tenure to the lord paramount, which could not be if only an estate tail passed to the donee and the reversion had remained in the donor, for then the tenure must have been of the donor. There was also a warranty to the donees and their heirs. But the judgment of the court does not appear to have depended upon

these special circumstances. *Vid.* acc. with the position of Lord Coke, *Beck's case*, Litt. Rep. 345. Anon. Moor 26. *Vid.* note 1. to Sanders on Uses. Com. Dig. Faits E. 9. *Doe v. Ellis*, 9 East. 386.

(d) That subsequent words which are general shall be governed by precedent clauses which are more particular, *vid. Thomas v. Howel*, 4 Mod. 69. *Payler v. Homersham*, 4 M. and S. 427. and *vide Vin. Ab. Grants* H. 13. pl. 41, 42, *et seq.*

(e) *Vid.* Mr. Hargrave's note (5.) Co. Lit. 155 b.

and to hold to him and his heirs, upon this fine the Judge cannot make question for any matter of law: but now the party comes and avers matter in fact; and saith, that A. had two sons named William (a), an elder, and a younger, and his intent was to levy the fine to William the younger; this (b) averment out of the fine is good of this matter of fact, which well stands with the words of the fine, and shall be tried by the country; and therewith agrees 47 E. 3. 16 b. But if a man by deed gives goods to (c) one of the sons of I. S. who has divers sons, here he shall not aver which son he intended; for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment. *Vide* 11 E. 4. 2 a. So if a man levies a fine of the manor of Soure, or of the manor of Dirtleby, to two *et hæredib'* and in truth there is the (d) manor of North Soure and South Soure or Great Dirtleby and Little Dirtleby, in this case issue may be taken *dehors*, which manor the consor intended to pass, for that is matter of fact not apparent in the fine, whereof the Judge cannot take consance: but it stands well with the fine, and shall be tried by the jury, and therewith agree 12 H. 7. 7. 26 H. 8. 6 a. 19 E. 2. Grants 93, but where the words are in the limitation of the estate to two (e) *et hæredibus*, that is apparent in the fine, and by judgment of law, these words *et hæredibus* are uncertain and void, as it is adjudged in 22 H. 6. 15 b. *Vide* 19 H. 6. 73 b. 20 H. 6. 35 b. 36. 22 E. 4. 6. (16) b. and no averment *dehors* can make that good, which upon consideration of the deed is apparent to be void. So if a man makes a feoffment to one and his heirs, no averment can be taken that the intent of the parties was, that the feoffee should have but an estate to him and the heirs of his body, *for such averment would be against the judgment of the law, which appears to the Judges upon the view of the deed; so in the case at bar, if the general word (*demandu*) had in law, by the judgment of the Judges, upon the consideration of the whole deed of release barred her of her dower, no foreign or collateral averment *dehors* could qualify or abridge the force and operation of the said word, but it ought to be qualified by apt words contained in the deed itself, as in this case it was. And afterwards judgment was given for the demandant (F).

(a) Br. Nosme 63. 5 Co. 68 a. b. Br. Fine 28. Fitz. Feoffment 56. (b) Moor 105. Hob. 32. Styles 293. (c) Br. Done 31. 10 Co. 51.

(d) Kelw. 49 a.

(e) 1 Co. 85 a. Hob. 174. Co. Lit. 8 b. Br. N. C. 156. Br. Estate 4, 18, 73. Fitz. Feoffments et Faits. 8. Plowd. 28 b. Bridgm. 134. 135. 1 Roll. [* 155 b.] 133. Perk. sect. 181. Kelw. 108. pl. 26. 1 And. 225. 2 And. 141, 142. 3 Bulst. 126. 4 Leon. 246. Godb. 121, 220.

(F) " At common law it is a rule, that no " parol evidence can be given of a man's " intent, who has put it into writing except " to explain a latent ambiguity." *Per* Lord Northington, *Stephenson v. Heathcote*, 1 Eden. C. C. 39. and *per* Mansfield, C. J. *Doe v. Oxenden*, 3 Taunt. 153. " From what " ever cause the ambiguity proceeds, whe-

" ther from a misdescription of the estate, " or from a misdescription of the person, " if there be a latent ambiguity, parol evi- " dence is admissible." *Vid.* the cases collected by Mr. Eden, note (c). *Stephenson v. Heathcote*, *ub sup.* and 1 Phillips on Evidence 513. 6th ed.

[156 a.]

ARTHUR BLACKAMORE'S CASE,

Mich. 8 Jacobi I.

The plaintiff's attorney made out a note for an original writ in this form :—
 “ London, *Leventhorp Franke, nuper de Hatfield, in comitatu Essex Militi, alias dict' Leventhorp Franke de Hatfield Brodock in comitatu Essex, Generoso, &c.;*” and delivered the note to the Cursitor of London. The cursitor made out the original writ in this manner, viz.
 “ *Præcipe Leventhorp Franke, nuper de Hatfield Brodock in comitatu Essex, generoso, alias dicto Leventhorp Franke de Hatfield Brodock in comitatu Essex, generoso, &c.* The entry of the *Capias alias et pluries* was according to the said original: but in the exigent and proclamation and the entry thereof, the defendant (as the truth was) was named Knight and afterwards he put in a *supersedeas* by the name of knight, and so the plaintiff declared against him, and afterwards judgment was given against the defendant by default, by the name of Knight. Upon error brought, the court resolved that the record, should be amended by the cursitor, according to the instructions given to him by the plaintiff's attorney. But they held that such original writ was not amendable by the common law, but by stat. 8 Hen. 6. cap. 12.

Of amendments at common law and by statute, &c.

1 Roll. 198.
 Of Amendments, &c. see
 5 Co. 121. Rep.
 Q. A. 131, 132.
 6 Mod. 156,
 269 to 287.
 Cumberb. 73.
 3 Salk. 30, 31.
 Lucas 270, &c.
 post.

AN original writ was brought in London: *Jacobus Dei gratia Angliæ, &c. Præcipe Leventhorp Franke nuper de Hatfield Brodock in comitatu Essex, Generoso, alias dicto Leventhorp Franke de Hatfield Brodock in comitatu Essex, Generoso (A) quod reddat Arthuro Blackamore, et Johanni Whittingham, 100l. quas eis debet et injuste detinet, returnable mense Michaelis;* the entry of the *Capias, alias, et pluries*, was according to the said original: but in the *Exigent* and *Proclamation*, and the entry thereof, the defendant (as the truth was) was named Knight, and in Easter term, anno 8 Jac. he put in a *supersedeas* by the name of Knight, and so the plaintiff declared against him: and the defendant imparled till Trinity term following, in which term judgment was given against him by default, by the name of Knight. And this Mich. term, anno 8 Jacobi Regis a writ of error was brought; and it was moved by Houghton, Serjeant, that the said original might be amended, because John Bunbury, the plaintiff's attorney, drew a note or title of the writ in this form; London: *Leventhorp Franke nuper de Hatfield in comitatu*

1 Roll. 198.

(A) Vid. Serjt. Williams' note 1. *Bennet v. Filkins*, 1 Saund. 14 a.

Essex, Militi, alias dict' Leventhorp Franke de Hatfield Brodock in comitatu Essex, Generoso, &c. ut supra, and delivered this note or title to the Cursitor of London; and he mistook it in hoc, that where in *primo nomine* he ought to be named *Militi*, in *primo nomine* the Cursitor named him *Generoso*, as he was named in the obligation; and this was the true case, as appears on the examination of the Cursitor, and of the said attorney, upon their oaths, and *upon view of the note or title in full Court. And whether this was amendable or not by this Court, the original being purchased out of another Court, *scil.* the Chancery, was the question. [* 156 b.]

And the case was well argued at the bar by counsel on both sides: and at last it was resolved, *per totam curiam*, that the record should be (a) amended by the said Cursitor, and made according to the note or title delivered him by the attorney (b). And for the better understanding of the law, and of the true reason of the rule of our books in this and other cases of amendments, 1. We must consider, if in this case the said original writ was amendable by the common law,—or by any statute, and by what statute? And it was resolved, that an original writ was not amendable by the common law in the case of a common person; *Vide* 13 E. 3. Amendment 63. which was before any statute made concerning amendments, &c. and in 16 Edw. 3. Variance 59. 29 Edw. 3. Amendment 68. But in the King's case, in a *Quare impedit*, where the writ of *Quare impedit* was (b) *præsentere* for *præsentare*, after exception taken to it, and before answer, by the advice of the Chancellor (out of which court this writ issued) and of the Judges of the King's Bench, the writ was amended in the Chancery, and the defendant was put to answer it by award. *Vide* (c) 4 H. 6. 16 b. & 40 (d) Ass. p. 26.

9 Co. 48 a. Fitz. Amendment 22. Br. Essoign 67. Br. Brief 212. Br. Office del Court 6. Br. Faux Latin 96. (d) Ante 26 b. Br. Amend. 59. Br. Faux Latin 74. Postea 162 b.

And where there appears in (c) 20 Ed. 4. 7. 10 Hen. 7. 25 a. b. a diversity of opinions, whether there were any amendment at the common law, or not? It is without question, that at the common law a fault of entry of a continuance, or of an essoign, which was the misprision of the Court itself, in the form of entry, was amendable by the court; as appears by 5 Ed. 3. 25. (f) where W. brought a *Præcipe* against B. who vouched to warranty C. who entered into the warranty and pleaded to issue, a *Venire facias* issued, &c. and the jury was respited; and in the roll it was entered, *Jur' inter B. and C.* (which was between the tenant and the vouchee) in such a plea, *ponitur in respect'* where the entry ought to be, *Jur' inter W. et C. quem B. vocavit ad warrant' et qui ei warr'*; and because this misprision of the entry in the roll was taken to be the default of the Court, (it was, as in the case of an essoign) amended by the Court. So in 10 Ed. 3. 20 a. the mispri-

Resolution of the Court, the writ shall be amended.

(a) 1 Roll. 198. Popham 203.

An original writ was not amendable by the common law.

Q. If in the King's case? See 6 Mod. 269 to 287.

Cumb. 73. 1 Sal. &c.

(b) Fitz. Amendment 19. 45 E. 3. 6 b. 8 Co. 26 b. Com. Dig. Amend. A.

(c) 8 Co. 26 b. Court 6. Br. 162 b.

(e) Br. Amend. 74.

(f) 6 E. 3. 25 a. Fitz. Amend. 73. Com. Dig. Amend. A.

(a) Vid. fully upon amendments, Tidd's cal Dictionary, Amendment. Com. Dig. Practice, Chap. Amendment. Lee's Practi- Bac. Ab. Vin. Ab. tit. Amendment.

(a) Br. Amend.
26. Fitz. A-
mend. 7.

At common
law the judges
might amend
their judgment
or any other

[* 157 a.]
part of the re-
cord, &c. in
the same term.

(b) Br. Amend.
Amendment 2.

But at common
law the mispri-
sion of clerks
in another term
in the process
was not amend-
able.

† Com. Dig.
Amend. B.

(f) 5 Co. 45 a.

The stat. 14 E.
3. extends to
a writ judicial
or process.

(g) Fitz. A-
mend. 52. Br.
Amend. 24.

(h) Br. Amend.
27. 1 Roll. 202.

Fitz. Amend. 8.
Post 162 a.

Dyer 261. pl.
25. Moor 681.

(i) 2 Vent. 171.
‡ Posten 162.

Fitz. Amendm. 51.

But not to an
original writ.

(k) Br. Amend.
20. Br. Faux
Latine 9.

(l) Br. Amend.
101. Post. 158.

2 Roll. 329. ...
Br. Protection

35. Br. Misno-
mer 22. Br. Variance 33. Fitz. Variance 45.

sion of the Court, in the entry of an *essoign*, was amended by the Court. And 12 Edw. 3. Amendment 62. acc. which books were before any statute of amendment. *Vide* (a) 2 Hen. 4. 4 a. 18 Edw. 3. Amendment 56. 19 Edw. 3. tit. Amendment 65. And at the common law, variance in any part of the record of the original was amendable by the common law, as it is said in (b) 7 Hen. 6. 45 a. So at the common law, the Judges might amend as well their judgment, as any other part of the record, &c. in the same (c) term, *for during the term the record is in the breast of the Judges, and not in the roll. *Vide* 7 H. 6. 29 a. b. (d) 9 E. 4. 3 b. 2 R. (e) 3. 11 a. b.

34. *Postea* 158 a. (c) Co. Lit. 260 a. 5 Co. 74 b. 2 Lord Raym. 1067. (d) Fitz. (e) Br. Amendm. 87.

But at the common law, the misprisison of clerks in another term in the process was not amendable by the Court, for in another term the roll is the record, † and therefore by the statute of (f) 14 E. 3. cap. 6. (which was the first act of amendment) it is enacted by the misprisison of clerks in every place wheresoever it be, no process shall be annulled or discontinued by mistaking in writing one letter, or one syllable too much or too little, &c. but shall be hastily amended in due form: but this statute extends only to the amendment of the mistake of the clerk in process to be amended in due form; for *anno* 15 Ed. 3. Amendment 58. which was the next year after the statute made, in *Detinue* of three writings, by omission of one writing in the continuance, all the proceeding was discontinued, notwithstanding the new statute, (*scil.* 14 E. 3.) which gave that the process should be amended. *Vide* (g) 45 Edw. 3. 19 b.

And this statute extends to a writ judicial, or process, as in trespass the *Nisi Prius* was *ad damnum* 100s. where the record was 100*l.* and the jury at the *Nisi Prius* found 20*l.* and the writ of (h) *Nisi Prius* was amended by force of this statute, and made 100*l.* according to the record 2 Hen. 4. 6 a. *vide* 45 Edw. 3. 19. And in 44 Edw. 3. 18. it is observed that a man has often seen the judicial writs amended by the roll, but the roll never (before the same case, as it is there said,) was amended. *Vide* 40 Edw. 3. 15, 36. 19 Hen. 6. 15. 3 Hen. 4. 8. and 11. 47 Ed. 3. 14. ‡ 7 Ed. 4. 15 b. 9 Hen. 7. 8. 4 H. 6. 6.

‡ Posten 162.

Fitz. Amendm. 51. Br. Amendm. 71.

But this statute doth not extend to an original writ, nor to a writ which is in the nature of an original, for that is not included within this word *Process*. And therefore (k) Finchden saith, in 41 Ed. 3. 14 a. if an original writ wants form, it is abateable, because an original is made in one place, and pleadable in another, and by consequence cannot be amended; otherwise it is of a writ judicial, *vide* 11 Hen. 4. 70 a. (l) A protection shall not be amended in the Common Pleas, because made in another Court. So it is held in 4 Hen. 6. 4 a.

Every original writ shall abate for want of form (as if the wife be named before (a) the husband) as well as if it wants matter without any amendment: but a judicial writ shall not abate for want of form, if it has sufficient matter, (b) 3 Hen. 4. 4 a. An original, † or that which is in the nature of an original, shall not be amended, and therewith agree 29 Ed. 3. Amendment 68. in Wagam's case, 22 Ed. 4. 47. vide 8 H. 6. 37 a. So in (c) 46 Ed. 3. Amendment 53. in a writ of entry *sine assensu capituli* brought by an Abbot against R. who pleads *non dimisit*, &c. *et de hoc ponit se super patriam et præd' R. similiter*; where it should be, *et præd' Abbas similiter*, and the jury was discharged, and it was not amended, for it *was not within the statute which gave, that process should be amended in due form, and therefore the parties repleaded. And it is to be known, that this word (process) which is the only word in this statute which is to be amended, is taken in law, in two significations, in one largely, and in the other strictly; and in the large sense it is taken for all the proceedings in all real and personal actions, and in all criminal and Common Pleas: *et ‡ processus derivatur a procedendo ab originali usque ad finem*. Vide Britton 138. And in this sense it is taken in the Register Original 123 a. in the writ *De continuando processum post mortem Capitalis Justic'* in a writ of Oyer and Terminer, within which words (*Processus*) as it there appears, is included not only the judicial process, but also the commissions, indictments, rolls, *et alia memoranda*: and in *alio sensu*, this word (*Processus*) is taken more strictly, *sc.* for the proceedings after the original upon the plea-roll before judgment, and that appears in the writ of error in the Register 216. and (d) F. N. B. the words of which are, *Quia in recordo et processu, ac etiam in redditione judicii*, &c. where *recordum* contains the plea-roll, and *processus* all the proceeding upon it until the judgment. See the writ of *Certiorari* in the Register 167 a. And in this sense, in all actions real, personal, and mixt, and not in pleas of the crown, is the said act of 14 Ed. 3. to be intended. And this appears by the said book in (e) 46 Edw. 3. Amendment 53. for the misprision was in the plea roll, and therefore it was not amended, and 46 Edw. 3. 19 a. b. in Trespass, distress issued (f) *Quindena Trin'* retournable *Quind' Mich.* and the roll was, *De quinden' Trin' ad quinden' Hilar'* and at *Quinden' Mich'* it was pleaded to issue, and found for the plaintiff, and the defendant shewed this matter in arrest of judgment, and the Justices would not amend the roll (which there is called the original) but awarded the parties to replead. But in 18 Edw. 3. Amendment 56 the mistake was in the entry of the essoign, which was out of the record or plea-roll, and that was part of the process, *i. e.* proceeding amendable by the said act: and that appears more fully after. But upon this statute there were diversity of opinions in divers points, *sc.* If the Justices before whom the plea should be depending by adjournment, error, or otherwise, (*Vide* 17 Ass. p. 2.) should have power to amend the mistake of the clerk in process in writing a letter or syllable, &c. also,

(a) 4 H. 6. 3 b.
4 a. Palm. 33.
2 Leo. 59. Br.
Brief 208. Br.
Faux Latin 349.
Br. Scire facias
129. Fitz.
Brief 24.
(b) Br. Misno.
18. Br. Vari-
ance 26. Fitz.
Variance 29
† 7 T. R. 299.
[* 157 b.]
(c) Post. 157.

Meaning of the
word *process* in
14 Ed. 3. c. 6.

‡ 1 B. & A. 285.

(d) F. N. B. 22
i. 24 d.

(e) Ante 157 a.

(f) Br. Amend-
ment 110.

Doubts upon
the statute 14
Ed. 3. cap. 6.

if they might amend it as well after judgment as before ; and these doubts were explained and declared by the statute of 9 Hen. 5. c. 4. and 4 H. 6. c. 3. to extend to all the Justices, and as well after as before judgment. And also a great doubt was conceived on these words, *Writing a letter or syllable too much or too little*, if a word might be amended : and (a) 40 Edw. 3. 34 b. Belknap saith, That the statute *of 14 E. 3. c. 6. that (b) a letter or syllable too much or too little in a word may be amended : but where there wants a word, of that the statute speaks nothing. Thorp, It was heretofore debated here before us, if a word fail in the record, if it might be amended, as if it had failed but in a syllable or letter ; and Sir Hugh Green and I went together to the council, and they were twenty-four of the Bishops and Earls, and we (c) demanded of them who made the statute, if the record might be amended ; and the Archbishop or Metropolitan said, that it was a nice demand, and a vain question of them, if it might be amended or not ; for he said that it might be as well amended in this case, as if it were but one letter ; for if a letter or syllable fail in a word, it is no word, wherefore if all the word fail, it may be amended as well as if it failed but of a letter, or of a syllable, for there is no more difference in the one case than in the other. And in 39 Edw. 3. 21 a. the question also was, if a word might be amended by the statute of 14 Edw. 3. and there Thorp said, That it shall be amended by the statute, for heretofore we were in doubt of it ; and because there was diversity in the surname in a writ, it was brought for the same cause into Parliament ; and the Lords who made the statute said, their meaning was that in all these cases the process should be amended. *Note*, where it is said in 40 Ed. 3. 34 b. that the Justices went to council ; it appears by 39 Edw. 3. 21 a. that they went to the Parliament, to know the opinion of those who made the law, 11 Hen. 4. 70 a. In a *Præcipe* the original was, Mich. *de T.* and the mean process was, Mich. *T.* and (d) (*de*) omitted, and a protection was cast by the name of *M. T.* and the mesne profits was amended by the statute of 14 Ed. 3. and that a word shall be amended within these words *letter or syllable*, and *eo potius*, because (*de*) is a word and syllable also ; but the protection was not amended, because it was made in another Court. 7 H. 6. 45. it seems that a (e) title shall be amended within these words, *letter or syllable*. To take away all which doubts, and to enlarge the power of the Justices in amendments, the statute of 8 Hen. 6. cap. 12. † was made. And that stands upon two general parts, *sc.* 1. Against corrupting and falsifying of records, by erasing, interlining, &c. which clause doth not concern the case in question. 2. Against the mistake of clerks (by force of which the amendment was in the case at bar) the words of which branch are, “ And that the King’s Judges of the Courts, and places in which any record, process, word, plea, warrant of attorney, writ, (original or judicial, for so the statute speaks in the first clause) pannel, or return which for *the time shall be, shall have power to “ examine such record, process, word, plea, warrant of at-

[* 158 a.]

(a) Fitz. Amendment 15.
Br. Amend. 18.
(b) Br. Amendment 18. Fitz. Amendment 15.

(c) 1 Mod. Rep. 153.
See 3 Salk. 30.

(d) 2 Roll. 329. Ante 157 a.
Br. Protect. 35.
Br. Misno. 22.
Br. Variance 33. Fitz. Variance 45. Br. Amend. 101.

To take away such doubts and to enlarge the power of the Judges in amendments, the stat. 8 H. 6. cap. 12. was made.

(e) Ante 156 b.
Br. Amend. 34.
Com. Dig. Amend. C. 1.
† Cumberb. 86.

[* 158 b.]

“torney, writ, pannel, and return, by them or by their
 “clerks, and to reform and amend in assurance of the
 “judgment of such records and processes, all that to them,
 “in their discretion, seemeth to be the misprision of the clerk
 “in such records, process, word, plea, warrant of attorney,
 “writ, pannel, and return, &c. So that by such misprision
 “of the clerk no judgment shall be reversed, or annulled.”

Note, reader, where the act of (a) 14 Ed. 3. speaks only of process, this act of (b) 8 Hen. 6. is of far greater extent, for it extends to process, and to seven other things, *scilicet*,—1. To any record. 2. Word. 3. Plea. 4. Warrant of attorney. 5. To a writ original and judicial, as appears by the first branch of the act. 6. Pannel. 7. Return. So that the power of the Justices as to amendment is by this statute greatly enlarged. Also,—1. This statute gives them power of examination. 2. Of reformation and amendment. 3. The statute expresses the matter which they shall reform and amend; *scilicet*, all that which to them, in their discretion, seems to be the misprision of the clerk in such records, process, word, plea, warrant of attorney, writ, pannel, and return. As to the first, they have power to examine such records, process, &c. in two manners:—1. By themselves. 2. By their clerk.

The act 8 H. 6. extends, 1. to any Record. 2. Word. 3. Plea. 4. Warrant of attorney. 5. Writ, original and judicial. 6. Pannel. 7. Return. Q. Cumberb. 34. (a) 14 E. 3. c. 6. (b) 8 H. 6. c. 12.

As to the power of reformation and amendment, they have power only to do it in assurance of the judgments of such records and processes: but although their power be thus enlarged, yet the misprision of the clerk (as it was in the act of 14 E. 3.) is only to be amended. And because there appears *prima facie* great uncertainty in our books concerning amendments (whereas in truth there are not any more certain rules in the law, if they are well observed and understood, than in case of amendment,) it will be necessary briefly to collect them out of the books at large, touching the construction of this statute. And because this principal case was of the amendment of an original:—1. It shall be shewed in what cases the misprision of the clerk in original writs shall be amended within this statute, and in what not. Every original writ stands upon two parts, one upon an artificial form, according to the Register, and that the (c) clerk ought *ex officio* to do by his knowledge and skill, without any instruction of the party: the other upon the true instruction by the party of the truth and particularity of his case, requisite to the composing of the writ, and that the clerk cannot *do without the party: so that an original writ may be vicious, by misprision either of the clerk, or of the party: by misprision of the clerk in five manners; 1. By mistaking the legal form. 2. By mistaking of one word which is not any Latin for another. 3. By omission or addition of words. 4. By mistaking the record, specialty, writing, copy, instruction, note, or titling of the writ delivered to the (d) clerk, or taken by the clerk for framing the writ. 5. By misprision of the clerk or officer in negligent keeping, or voluntary defacing, &c. of a record, &c. And because the case of amendment in the case at bar was not for any misprision of the bond on

The Judges have power to amend in assurance of judgments.

(c) 2 Roll. Rep. 285.

[* 159 a.] An original writ may be vicious by misprision of the clerk in five manners.

(d) Cr. El. 79.

The want of legal form in an original writ is not amendable by stat. 8 H. 6.

(a) Cr. El. 170. 5 Co. 45 a. b. (b) 3 Co. 38 a. Co. Lit. 73 b. Pref. F. N. B.

(c) Cr. El. 119, 462.

(d) Br. Amend. 78. Fitz. Amend. 4. 5 Co. 35 b. (e) Cr. El. 170.

(f) Cro. El. 79, 258, 435.

(g) Cr. El. 119

[* 159 b.]

(h) 22 E. 4. 21 b. Br. Amend. 78.

(i) Fitz. Amend. 44. Br. Amend. 56.

(k) 8 H. 6. c. 12.

(l) Fitz. Amend. 35. Br. Amend. 6.

Br. Brief. 519. Postea 161 b.

which the writ was grounded (for he has pursued it in all) in which bond the defendant was named *Generosus*, as he was in the writ. But the misprision of the clerk of the Chancery was in this, that he did not pursue the note or instruction in writing delivered him, *scil.* to name the defendant knight *in primo nomine*, because after the making of the bond he was made knight: this difference is first to be observed, that if the original writ wants legal form, it is such a (a) misprision which is not amendable by this act, for the officers and clerks of the Chancery are bound by the duty of their offices to have skill and knowledge in the true form of original writs (which are the (b) foundations upon which the whole law depends) and therefore if form of original writs shall be neglected, ignorance, the mother of error and barbarousness, will follow, and in the end all will be involved in confusion, in subversion of the ancient law of the land, for in this case it is true that *forma dat esse*; and therefore it was never the meaning of the makers of the act within these general words, (misprision of the clerk in original writ) to (c) extend it to misprision of the form of the original writ, which would introduce so great inconvenience; and therewith agrees a notable judgment, in 22 Ed. 4. 21 b. and 22 a. in *Eliz. Hatley's case*, where a writ of debt was brought against executors for a debt due by the testator in the (d) *Debet et Detinet*, where by the form of the Register it ought to be in the *Detinet only* (c); and there it is resolved by the whole Court, that it shall not be amended, for there a difference is taken and resolved between (e) negligence, and ignorance of the clerk; for negligence, that is, the oversight of the clerk in mistaking, as if he has the bond or a copy of the bond, and doth not follow it, (f) the mistaking, that is, oversight and negligence in this case, and in all like cases, shall be amended by the statute of 8 Hen. 6. But (g) ignorance or not knowing, (for *scientia scilorum est mixta ignorantia*) of the clerk in *the legal form, and course of the original, is not a misprision amendable by the said statute. So if the writ be *Præcipe quod solvat*, for (h) *Præcipe quod reddat*, or *Warr' chartæ unde pactum habet*, for *unde chartam habet*, these are faults of form, and therefore are not amendable by this act. And for the first part of this difference, as to the copy of the bond, it is held, in 38 Hen. 6. 4 a. that where the clerks of the Chancery use to take titling of the matter which the party shews them, if the party to have a *Formedon in descender* shew the clerk that the land descended to one as son and heir of the donees, &c. and the clerk draws the writ, that the land descended to him as son, (and omits (i) heir) if the clerk shews his titling and will testify it, it shall be amended in the Common Pleas, and that is, by the said statute of (k) 8 Hen. 6. *Vide* 22 Edw. 4. 48 b. 38 Hen. 6. 39 a. b. and 11 Hen. 7. 41 b. agree to the case of a copy. But if the writ wants legal form, it is not amendable. *Vide* 14 Hen. 4. 10, 11. (l) 27 Hen. 6. 6 b. 11 Hen. 6.

(c) Vid note (a) *Hargrave's case*, Vol. III. p. 64.

14. 34 Hen. 6. 26. 28 Hen. 6. 11. and upon this reason it has been often adjudged since this statute of (a) 8 Hen. 6. that false Latin † in an original writ shall not be amended, because it wants legal form, and is to be imputed to the ignorance of the clerk, 9 Hen. 7. 16 b. as (b) *hos breve*, for *hoc breve*; and the common law is curious in observing the form of the Register, and therefore it is adjudged in 6 Edw. 3. 36 b. 37 a. that where a trespass done by divers is joint or several, at the will of the plaintiff, yet in an action against John, guardian of the hospital of B. and brother Rob. L. and brother Rich. F. inasmuch as this default of the clerk for want of form, that these brethren are not named Confrerers, as it ought to be by the form of the Register, the writ shall abate against all, although the guardian be well named. But in trespass against two, misnomer of one of the defendants shall not abate the whole writ, but it shall stand against the other who is well named; for there Herle took the difference, when the writ abates by the plea of the one for want of form, although the others have pleaded to issue, the writ shall abate against all; † but although one may abate the writ for matter in fact, as by reason of the misprision of his name, nevertheless the writ shall stand against the others. Vide 2 H. 7. 16. 11 H. 7. 5, 6. 21 H. 7. 31. 7 E. 4. 10. 5 E. 4. 2. 11 Ass. 15. 12 Ass. p. 14. 27 Ass. p. 45. 9 Hen. 6. 36. 12 E. 3. Brief 670. 12 E. 3. Brief 481. 27 H. 8. 26. 5 Plow. Com. in assise of Fresh Force.

(a) 8 H. 6. c. 12.
† 1 Lev. 2, &c.
ib.
(b) Br Faux
Latin 78. 2
Vent. 173. 2
Sand. 39. Hob.
66.

In trespass against two, misnomer of one does not abate the whole writ.

† Com. Dig.
Abate. N. 6 Co.
64 b.

But as to the second manner of misprision in negligent writing of a word which is not a Latin word, that is amendable, as (c) *imaginavit*, for *imaginatus est*, it shall be amended, as it is adjudged in 11 Hen. 6. 3. 17. So was it adjudged in 3 Edw. 6. as Bendloes, Serjeant, reports, that where in a writ of *Aiel* the writ was *avæ*, (d) for *aviæ*, it was amended (n).

2d manner of misprision, viz. in writing a word which is not Latin, is amendable.

1 Lev. 2, &c.
(c) 2 Vent. 173.
Fitz. Amend.

24. Br. Amendment 81. (d) 5 Co. 45 b. Moor 5. 1 And. 24. N. Benl. 33. pl. 53. 1 Lev. 2. seems contra, per Twisden and Windham, J.

*As to the third manner of misprision in negligent omission or addition of a thing which it appears he himself ought to have added, or omitted of course; as by the omission of *Dei Gratia* in the King's stile, it shall be amended. 22 Hen. 6. 8. So 3 Ed. 6. as Bendloes, Serjeant, reports, these words in a *Partitioe faciend'* (e) (*ostensur' quare non feceret*) were left out, and it was amended. Vide 35 H. 6. 6. 10 a. 2 Hen. 7. 11 b. 9 Hen. 7. 19. for addition of that which is apparent ought to be omitted. But the (f) omission or addition of any thing which alters the form of the writ is not amendable, as the addition or omission of (g) *Detinet*, as appears in 11 H. 6. 14 a. b. or the addition of *Debet*, as appears in 22 E. 4. 21 b. 22 a.

[*160 a.]

3d manner of misprision by omission or addition of words, is amendable.

(e) 5 Co. 45 b.
Moor 5. 1 And.
24. Dal. 5. pl. 9.
N. Benl. 33.
pl. 53.

(f) Cr. El. 119.
(g) 5 Co. 35 b.

As to the fourth manner of misprision, sc. of the record or

4th manner of misprision.

(n) Vid. stat. 4 Geo. 2. cap. 26. that proceedings in Courts of Justice shall be in the English tongue.

specialty, &c. *Vide* 21 H. 6. 8. 22 H. 6. 43. 37 H. 6. 34. 19 H. 6. Amendment 47. 8 E. 4. 4.

5th manner of misprision in negligently keeping, or voluntarily defacing, &c. a record, is amendable.

(a) 1 And. 79, 80.

6 Mod. 138.
Com. Dig. A-
mend. D. 4.
Cumberb. 34. &
6 Mod. Tut-
chin's case.

[* 160 b.]

(b) Palm. 199.
11 Co. 34 b. 3
Inst. 70, 71, 72,
73. Standf. Pl.
Cor. 36 b. Dalt.
Just. 386. 6
Mod. 280.

If the part of the record which is stolen cannot be supplied by the other parts, nor by any exemplification made

As to the fifth manner of misprision, in negligence of a clerk or officer, not in writing, &c. but in negligent keeping of the records, or in voluntary defacing of them, whereby the record becomes imperfect or erroneous, in Trin. 24 Eliz. the case was that Henry Fitz-Allen, late Earl of (a) Arundel, in the reign of Queen Mary suffered a common recovery of divers manors, and of lands and tenements in the county of Sussex; and the original writ upon which the recovery was had, being greater and broader than the other writs of the same file, by the negligence of the officer by continual handling of it, a great part of this writ, which was more spacious than the rest, was obliterate, and worn out, so that but one letter of many of the names of divers of the said manors could be perceived, but the names of the manors were truly recited as well in the count (which always briefly recites the writ) as in the *Habere facias seisinam*: and whether this original was amendable, or not, was a great question between P. Howard Earl of Arundel, cousin and heir of the said Henry Earl of Arundel, and the Lord Lumley, to whom the said Henry Earl of Arundel had conveyed divers of the said manors, &c. And to resolve this question, Sir Christopher Wray, Chief Justice of England, Sir Edward Anderson, Chief Justice of the Common Pleas, Sir Roger Manwood, Chief Baron of the Exchequer, and all the justices of England, assembled themselves together. And it was resolved by them all *una voce*, that the original writ should be amended according to the other parts of the record, *scil.* the count, and the *Habere facias seisinam*; and that this misprision and negligence of the clerk in keeping of the original writ should be amended by this statute of 8 Hen. 6. for here doth not appear any want of knowledge in the clerk, but misprision and negligence in keeping of the writ, which is a misprision within the letter *and meaning of the act; and *eo potius* in this case, because it was in a common recovery suffered by assent of the parties for assurance of lands. And although it is enacted, that if any record, or parcel thereof, writ, return, pannel, process, or warrant of attorney in the King's Courts, &c. are voluntarily (b) stolen, carried away, withdrawn, or avoided by any clerk, that it shall be felony; that doth not prove, that if the original writ or other part of the record be voluntarily stolen, &c. that it cannot be supplied and amended by the other parts of the record: for it was resolved that in both cases, as well where the record becomes imperfect and erroneous by voluntary offence of the clerk, as by his careless negligence, that it should be amended, for all is within this general word, misprision of the clerk. But if such part of the record which is so stolen, &c. or which appears not, cannot be supplied by the other parts of the record, nor by any exemplification made of the record, then it cannot be amended; and *vide* the first clause of this act of 8 Hen. 6. gives remedy amongst others, where any subtraction or

diminution is of any record, process, warrant of attorney, original writ, &c. And according to this resolution a fine was amended of Mich. 8 Jac. as appears by the order and rule of Court following.

Crompton.

Mich. 8 Jacobi Regis.

Lincoln ss. *In fine levat' in cur' hic in Octab' Sancti Hilarii, anno regni dom' Eliz. nuper Reginae Angliæ 16 inter Robertum Tyrwhite Militem et al' quer' et Edmund Dighton, Armiger' et al' deforc' de maneriis de Magna Sturton, Parva Sturton, et al' in com' præd' ; quia constat cur' super visum pedis ejusdem finis, quod per humiditatem aeris, et pluviam super illam descenden' idem pes finis adeo obliterated est, ut multæ lineæ ejusdem totalit' deletæ ita ut legi non possunt: tamen per breve de conventionione, et dedimus potestatem de cognitione inde capiend' ac per concordiam et notam ejusdem finis satis liquet et apparet quæ fuerunt verba in eodem pede prius scripti'. Ideo ordinat' est, quod præd' pes finis cum proclam' super inde indorsat' per chirographar' de novo rescribatur, ita quod concord' cum præd' brevi de convent' dedimus potestatem, concordia, et nota ejusd' finis, et cum aliis proclam' indorsat' super pedes finium ejusd' terni' et quod præd' pes finis sic obliterated a filac' inde abstrahatur, et præd' pes finis sic de novo rescript' in loco ejusdem affilatur.*

A fine amended by order of the Court.

And this briefly shall suffice for amendment of the misprision of the clerk in an original writ (E). And as to the case at bar, the *rule of the court was in these words: *Crompton. Ordinatum est per cur' hic super auditu consilii utriusque partis et examinatione Clerici Cursistar' London et attornat' quer' super sacramenta sua in cur' hic, quod hæc additio (generoso) nomini defend' in priori parte brevis original' de debito 100 li. inde retorn' et affilat' in Banco hic mense Michaelis anno regni Regis nunc septimo, et omnes misprisiones in recordo et process' ejusd' placiti proinde subsequen' emendentur, et fiat (Militi) secundum instructiones in script' prius deliberat' præf' Cursistar', viz. præd' breve originale per præfat' Cursistar' et recordum, et process' præd' per Philizar' hujus curiæ.*

Rule of the Court in the case at bar. [* 161 a.]

The next word in the act of (a) 8 H. 6. is (record) and the first part of the record is the count; and briefly a count which wants substance shall not be amended in another term (F) as appears (b) 7 H. 6. 26 a. (c) 35 H. 6. 37 b. (d) 38 H. 6. 1 a. (e) 7 Ed. 4. 26 b. 9 Ed. 4. 5. (f) 33 H. 6. 2 a. *Vide*

A count which wants substance cannot be amended in another term.

12. Br. Amendment 30. (c) Br. Amendment 15. Br. Count 22. Br. Facts 5. Fitz. Forger de Faux Facts 14. (d) Br. Count 504. (e) Br. Count 92. (f) Br. Amendment 8.

(a) 8 H. 6. c. 12. (b) Fitz. Count

(E) "The true rule is that original writs may be amended by 8 H. 6. c. 12. where it is only the misprision of the clerk: but a mistake occasioned by the nescience or ignorance of the clerk is not amendable by that statute." *Per Willes, C. J. Wynne v. Thomas, Willes 568.*

(F) It is now settled that whilst the pleadings are in paper, and before they are entered on record, the Court or a Judge will amend the declaration, plea, replication, &c. in form or in substance, on proper and equitable terms. *Tidd's Practice, Vol. II. 753. 8th Ed.*

38 H. 6. 2. 33. and 30 H. 8. Br. Amendment 80. for the King's case.

By stat. 36 E. 3. c. 15. the declaration having substance, shall not abate for want of form.

(a) 10 Co. 132 b. Cr. Eliz. 85.

2 Bulstr. 214.

Dyer 299. pl. 32.

Co. Lit. 304. b.

(b) Plowd. 83 b.

2 Bulstr. 214.

Dyer 299. pl. 32.

(c) Fitz. A-

amendment 37.

Br. Amend-

ment 93. Fitz.

Brief 109. Br.

Brief 28. Br.

Nugation, &c.

23.

(d) 8 H. 6. cap.

12.

(e) Fitz. Amend-

ment 49.

Br. Amendment

68. Br. Brief

478. Br. Count.

64. 1 Roll. 208.

20 H. 6. 18 a.

Br. Amend. 5.

Fitz. Amend-

ment 28.

† Vide Stat. 4

& 5 Ann. c. 16.

[* 161 b.]

The record in

another term

may be amend-

ed by the paper

book of the

office.

(f) Cr. Eliz.

258. Salk. 50,

51.

(g) Fitz.

Amendment 35.

Br. Amend. 6.

Br. Brief 519.

Antea 159 b.

(A) Br. Amendment 112.

(i) Er. Amendment 5.

Fitz. Amend. 28.

A thing appa-

rent to be a

misprision

which the clerk

ought of course

to have added

without any

instruction of

the party, al-

though in a

material point,

shall be amended

in another term.

(A) Br. Amend. 1.

(i) Cr. Car. 38.

Cr. Jac. 64, '65.

(m) Cr.

Jac. 587. 1 Roll. 300.

3 Salk. 31.

Skinner 591.

But it is enacted by the statute of (a) 36 E. cap. 15. that by the ancient forms and terms of pleadrs no man be prejudiced, so that the matter of the action be fully shewed in the declaration and in the writ. *Vide* Eveleigh's case, 13 Eliz. Dyer 299. by the statute of 36 E. 3. c. 15. the declaration having substance shall (b) not abate for form. *Vide* 28 H. 6. 8 a. In a writ brought by John Gargrave against Thomas Beamond on a bond, and the bond was, *Noverint, &c. me Thomas Beamond, teneri, &c. Joseph Gargrave* (without addition) and the writ was, *Præcipe, &c. quod reddat Joseph Gargrave* (c) *Armig'* with addition; and it was moved, that it might be amended by the stat. for it is the misprision of the clerk: but it was adjudged, that the writ should abate for this variance and should not be amended, as it should if it was on the defendant's part; for where the surplusage is on the plaintiff's part, as well in the writ, as in the count, a man cannot mend his own count. And this judgment was after the said stat. of (d) 8 H. 6. which proves that the said first clause of this very act, which speaks of addition or diminution, &c. extends only to corruption, and misdemeanor in addition or diminution, and in vitiating of a record, and not where it is done *in rei veritate*, although it be by misprision. *Vide* 4 E. 4. 14 b. (e) A space in the declaration for the place where the obligation was made was not amendable in another term. And this which has been said of the count shall suffice. Other parts of the record are, plea in bar, replication, &c. and regularly matter of substance in them, and especially matters of fact shall not be amended in another term, as omission of averment, *et hoc parat' est verificare, &c.*† for in some cases, as in avowry, &c. it is not of necessity, but colour which is of course, and in which there is a misprision of the Clerk, shall be amended.

* And the record in another term may be amended by the (f) paper book of the office, for it was the misprision of the Clerk in the entering of it, and no fault in the party or his counsel. (g) 27 H. 6. 6. b. (h) 10 H. 7. 23 a. b. 25. a. 11 H. 7. 2 a. b. (i) 20 H. 6. 18 a. (k) 27 H. 8. 1 b. the misprision of a certificate of a record on a writ of error shall be amended according to the record, 22 E. 4. 46. and 21 H. 7. 41. but that is by the express provision of the said statute of 8 H. 6. for it was the act of the Judge, which was not amendable by the said branch of the act, as shall be said after.

(A) Br. Amendment 112. (i) Er. Amendment 5. Fitz. Amend. 28.

A thing apparent to be a misprision, which the (l) Clerk of course ought to have added, without any instruction of the party, although it be in a material point, shall be amended in another term. As if in debt brought, the defendant pleads *nil debet, et de hoc ponit se super patriam, et præd' defendens similiter*; where it (m) ought to be, *et præd' querens similiter*, it shall be amended by this act of 8 H. 6. 11 H. 7. 2. acc. which case was not amended by this act of 14 E. 3. as appears

(A) Br. Amend. 1. (i) Cr. Car. 38. Cr. Jac. 64, '65. (m) Cr.

Jac. 587. 1 Roll. 300. 3 Salk. 31. Skinner 591.

by the book in 46 E. 3. before ; for the first act speaks only of process, and this act speaks of the record and plea. So in an action brought against Sir Roger Townsend, he pleaded in bar, and concluded, which matter *præd' Johan'* is ready to aver, where it should be *Rogerus* ; and it was amended by the advice of all the justices ; as it is reported in 11 H. 7. 25 a.

And as to the writ of *Nisi prius*, it is to be known, that the misprision of the Clerk of the treasury, who writes it, is also therein amendable by this statute, and to be made according to the record, but with this caution, *scil.* that the record of *Nisi prius* have sufficient matter in it, either expressed or implied, to give authority to the Justices of *Nisi prius* to try the issue ; for they cannot try any issue by force of the statutes made thereof, without authority given to them by writ of *Nisi prius* and so it is adjudged in 11 H. 6. 11. a. b. in debt against J. S. husbandman ; issue was taken, if he was husbandman *die impetrati' brevis* ; and the writ of *Nisi prius* was, whether he was husbandman (omitting these words, *die (a) impetrationis brevis*) which was the material point of the issue ; but the roll was well, and the jury passed for the plaintiff, and found that the defendant was husbandman *die impetrationis brevis* and the writ of *Nisi prius* could not be amended by the statute of 8 H. 6. because the Justices of *Nisi prius* have no power to try the issue contained in the record, because *die impetr' brevis* was omitted in the *Nisi prius* ; and if the Justices of *Nisi prius* had taken the verdict according to the issue in the writ of *Nisi prius* that he was husbandman generally, without saying *die impetrat' brevis*, it had been contrary to the roll ; wherefore it was awarded, that the plaintiff should sue a *Venire factus de novo*. But 9 Eliz. Dyer 260, 261, in *partitione fuc'* by Wotton against (b) Anthony Cook and Temple, who appeared, and Temple *confessed the partition, and judgment given accordingly, *sed cesset executio*. Cook conveyed title in severalty, and traversed the supposal of the writ and count by *absque hoc*, the plaintiff maintained the writ and count, *et hoc petit quod inquiratur per patriam, et præd' Anthonius similiter, ideo* 12, &c. And in the record of *Nisi prius* the issue was well recited, and no part of it omitted : but where the plaintiff concluded, *et hoc petit quod inquiratur per patriam*, by the negligence of the Clerk of the Treasury, the writ of *Nisi Prius* was, *et præd' similiter*, omitting this word *Anthonius* in the close and joining of the issue. And farther, the jury entered into the record of *Nisi Prius* was, *inter* Wotton plaintiff, and Cook and Temple defendants, where Temple had made a confession of the partition before, and so a stranger to the issue : but the record which warranted it was well enough ; and notwithstanding these faults and misprisions, the issue was tried at *Nisi Prius*, and afterwards by the Rule of the Court of Common Pleas, the verdict was well taken, and the said misprisions were amended ; for sufficient authority was given by the writ of *Nisi Prius* (which is but the transcript of the record) to try the issue, and to take the verdict. If a man declare of damages of 100*l.* and the

In a writ of *Nisi Prius* the misprision of the Clerk of the Treasury who writes it is amendable, if the record of *Nisi Prius* have sufficient matter in it expressed or implied, to give authority to the Justices of *Nisi Prius* to try the issue.

(a) Fitz. Amendment 25. Br. Amend. 82. Salk. 48, 49. 1 Lord Raym. 94.

(b) 1 Roll. 202. Dyer 260, 261. [* 162 a.] pl. 24, 25. Cr. Car. 54, 278. 2 Brownl. 47. 3 Bulstr. 161. Yelv. 109. Cr. Eliz. 776. Palm. 524. Moor 681.

(a) Antea fol. 157 a. Dyer 251. pl. 25. Br. Amendment 27. 1 Roll. 202. Fitz. Amend. 8. Moor 681. (b) Antea 157 a. Fitz. Amend. 51. Br. Amend. 71.

record of *Nisi Prius* is 100s. and the jury give damages 20*l*. the (a) *Nisi Prius* shall be amended and made 100*l*. according to the roll : for it is the misprision of the Clerk, which doth not change the issue. *Vide* 11 H. 7. 1 b. 10 H. 7. 25 a. b. and so it was adjudged in 2 H. 4. 6. a. *Vide* 39 E. 3. Br. 105. (b) 7 E. 4. 15. *Vide* after, when misprision of the Clerk in the entry of the verdict of judgment, which are other parts of the record, shall be amended. As to (word) that has been explained before.

As to this word (plea) that has been explained before in the word (record) which includes it.

(c) Palm. 231. B. N. C. 43. † 23 Hen. 8. Br. Amen. 85. in medio. 24 H. 8. Br. Amendment 47. in fine. (d) Dyer 105. pl. 16. 1 Roll. 289. 1 Roll. Rep. 16. (e) Dyer 180. pl. 48. 1 Roll. 290. (f) 92 H. 8. c. 30. and 28 Eliz. c. 14. (g) Dyer 230, 231. pl. 58. 1 Roll. 290. 1 Roll. Rep. 305. (h) Fitz. Amendment 48. Br. Amendm. 67.

As to (c) (warrant of attorney)† see 23 Hen. 8. Amendment 85. 24 Hen. 8. Amendment 47. 2 Ma. Dyer (d) 105. 2 Eliz. Dyer (e) 180. 5 Eliz. Dyer (f) 225. 6 Eliz. Dyer (g) 231. But when no warrant of attorney is put in, it is not remedied by this act. As to panel and return, in what cases misprisings of them shall be amended within this stat. *vide* (h) 2 E. 4. 7 a. b. 9 E. 4. 14 a. 33 H. 6. 42. after the Sheriff is removed or dead, &c. 37 H. 6. 12. 3 H. 7. 14. 12 H. 7. 19. But no return is not helped by this statute.

What is amendable before error brought, is amendable after; and if the inferior Court does not amend, the superior may. (i) 2 Roll. Rep. 253. Willes 7. Tidd's Practice, 770. 8th. Ed. 2 Chitt. Rep. 22. (k) 2 Roll. Rep. 253.

And it is to be observed, that (i) those things which are amendable before the writ of error brought are amendable after the writ brought : and if the (k) inferior court doth not amend them, the superior court may amend them.

What is not amendable by stat. 8. H. 6. cap. 12.

It is necessary now to shew two things ; 1. What things are not amendable by this act of H. 6. 2. How many of them, not remedied by this act, are remedied by other statutes. As to the first, this act of 8 H. 6. c. 12. nor the act of 8 H. 6. c. 15. do not extend to 14 misprisings. They do not extend to want of an original (g), but to misprision of the Clerks, as *is aforesaid in an original. 2. They do not extend to misprision of (l) form in the original, either false Latin, or variance from the register. 3. They do not extend to a material variance betwixt the original and the count. 4. They do not extend to insufficient trial, *scil.* when the venue is mistaken : but misprision of the Clerk in the entry of the (m) verdict shall be amended in another term, according to the note found by the jurors : so was it adjudged in Rawlin's case in the Fourth Part of my Reports 29 & 30 Eliz. 52 b. 5. They do not extend to a jury returned by the Coroners, where the Sheriff ought to return it, or *e contra*. *Vide* Bainham's case,

[* 162 b.]

(l) 5 Co. 45 a.

16, 17 C. 2. c. 8.

(m) Palm. 260. Salk. 53.

(a) In *Carr v. Shaw*, 7 T. R. 299. Lord Kenyon C. J. said, "that there was no doubt but even an original might be amended on an application to the Master of the Rolls, though it could not be amended in the court of K. B. That, when he was Master of the

"Rolls, he had known several instances of the kind; and that before he was Master of the Rolls, an original had been supplied, even in the case of a penal action brought by Sir R. Bampfylde on the game laws."

in the Fifth Part of my Reports, fol. 36 b. *Vide* 21 & 22 Eliz. Dyer 367. 6. They do not extend to a trial where no return is endorsed on the *Venire facias*, (a) Rowland's case in the Fifth Part of my Reports, Mich. 35 & 36 El. fol. 41 b. 7. They do not extend to a trial, where one appears who was not returned on the *Venire facias*. The Countess of Rutland's case, in the Fifth Part of my Reports, folio 42. 8. They do not extend to a return of the *Venire facias* without the name of the Sheriff. 9. They do not extend to a jeofail, want of colour, insufficient pleading, or to any other default of the party, or of his counsel. 27 H. 6. 10. 18 E. 4. 3. 20 E. 4. 6. 11 H. 6. 28. For the statute extends only to misprision of Clerks. 10. For the same reason they do not extend to any error or misprision of the Judges in any term past. 2 R. 3. 11. 9 E. 4. 3. *Vide* 30 H. 6. 1. But misprision of the Clerk in the entry of the judgment of a thing which is apparent, (b) and not of necessity, is amendable, as the misprision of the summing of the arrearages before and pending the writ of annuity, shall be amended, 35 H. 8. Dyer 55. 11. They do not extend to that, where the Justice of *Nisi prius* takes the Verdict *post ipsum diem* in Bank, 1 Ma. Dyer 97. and 33 H. 6. 25. 12. They do not extend to want of warrant of attorney. 13. This statute nor the statute of 32 H. 8. c. 30. do not extend to help any of the imperfections or misprisions, where a verdict is given on an issue joined betwixt the demandant and the vouchee, (c) or the tenant and the vouchee, as it was resolved Mich. 1 & 2 Phil. & Mar. Bendloe. But if any error in law be in the judgment, as *ideo in misericordia*, for *pro capiatur*, or *e contra*, or the like; † that is not amendable in another term, as it has been oftentimes adjudged (n).
 (a) 5 Co. 41 b. 42 a.
 (b) 2 Roll. Rep. 253, 254.
 (c) 11 Co. 6. b. 5 Co. 36. b. 1 Anders. 26. 27. pl. 60. O. Beul. Kelw. 207. b. Beul. in Ash. pl. 5.
 Hob. 281. 21 Jac. c. 13. † *Vide* stat. 4 & 5 Annæ, c. 61;

(n) By stat. Jac. 1. c. 13. judgment after verdict shall not be stayed or reversed by reason of any variance in form only between the original writ or bill, and the declaration, plaint, or demand, &c. or by reason that the *venire facias*, *habeas corpora*, or *distringas* is awarded to a wrong officer upon any insufficient suggestion, or by reason the visne is in some part misawarded or sued out of more places, or fewer places, than it ought to be, so as some one place be right named, &c. &c. or for that the sheriff's name or other officer's name is not set to the return of any such writ, so as upon examination it be proved that the said writ was returned by the sheriff, or under sheriff, or any such officer; and by 16 and 17 Car. 2. c. 8. judgment after verdict shall not be staid or reversed for want of form or pledges returned upon the original writ, or because the sheriff's name is not returned thereon, or for want of pledges upon any rule or declaration, &c. &c. nor for want of averment of *hoc paratus est verificare*; or of *hoc paratus est verificare per recordum*, &c.; or for that there was no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid; nor

any judgment after verdict, confession by *cognovit actionem*, or *relicta verificatione* shall be reversed for want of *misericordia* or *capiatur*, or by reason that a *capiatur* is entered for a *misericordia*, or *e converso*, &c. By 5 Geo. 1. c. 13. judgment after verdict shall not be stayed or reversed for any defect or default in them in form or substance, in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings.

By stat. 4 Anne, c. 16. § 2., the statutes of Jeofails are extended to judgments upon confession, *nil dicit*, or *non sum informatus* in any court of record, so as there be an original writ or bill and warrants of attorney, duly filed according to law. And by stat. 9 Anne, c. 20. § 7, this and all the statutes of Jeofails are extended to writs of *mandamus*, and informations in nature of a *quo warranto*.

By stat. 6 Geo. 4. cap. 50. § 13. Every writ of *venire facias* for the trial of any issue, civil or criminal, shall direct the sheriff to return the jury of the body of his county.

The said misprisions are not remedied by any law or statute, where no verdict is given upon issue joined.

What misprisions are not remedied after verdict by stat. 32 H. 8. & 18 Eliz. &c.

2 Lord Raym. 1071

(a) 21 Jac. c. 13. Hob. 77.

(b) 5 Co. 36 b, †Palm. 151, 152.

(c) Cr. Car. 278, 279. 1 Jones 302.

(d) Antea 120 b. 133 b. 3 Co. 52 b. Wing. Max. 240.

(e) Dyer 363. pl. 23. Bridg. 73. 1 Roll. Rep. 305. 2 Bulstr. 245.

(f) 18 El. c. 14.

14. Nor do they extend to an appeal, nor to pleas of the crown, nor to any proceeding upon them, for they are excepted, nor to the amendment of any exigent, to make any one to be outlawed, &c. 20 H. 6. 18. 7 E. 4. 16. 22 E. 4. 7. 38 H. 6. 3. 21 H. 7. 34. Vide 7 H. 4. 27. Now as to misprisions not remedied, neither by the stat. of 32 H. 8. c. 30. nor by the stat. of 18 El. c. 14. 1. All the said misprisions not remedied by the said stat. of 8 H. 6. remain yet not remedied by any law or statute where no verdict is given upon issue joined: as if judgment *be given upon confession, demurrer, *nihil dicit*, *non sum informatus*, or otherwise than by verdict of twelve men upon issue joined. 2. When a verdict upon issue tried is given, ten misprisions are not remedied by the statutes of 32 H. 8. 18 Eliz. or any other statute, but yet remain not amendable. 1. Material variance betwixt the original and the count, as it is resolved in *Bishop's case*, in the Fifth Part of my Reports 37. 2. (1) When the original or count wants substance: Vide *Freeman's case*, Pasch. 41 Eliz. in the Fifth Part of my Reports, fol. 45. 3. Insufficient trial, *scil.* when the (a) venue is mistaken, and verdict passes. 4. When the return of the jury is by the Coroner, (b) where it ought to be by the Sheriff, or *e converso*. 5. When the Sheriff doth not put his name to the return of the jury. 6. Where on the *Venire facias*, &c. no return is endorsed, although verdict passes. 7. When one appears, and is sworn, and amongst the others gives verdict who is not (c) returned on the *Venire facias*, &c. 8. In an appeal, or plea of the crown, as indictments, &c. or any proceeding upon them; for they are excepted in the acts of 8 H. 6. and 18 Eliz. and the statute of 32 H. 8. doth not extend to them. 9. Although verdict on issue tried be given for the plaintiff, yet if on (d) the whole record it appears to the court that the plaintiff has no cause of action, he shall never have judgment; and that is not remedied by any statute, as it has been oftentimes adjudged. 10. An error in law by misprision of the judges in the judgment entered in another term is not amendable by any statute. If the plaintiff in an assise recovers, and has not put in any warrant of attorney, this error was not remedied by the statute of 32 H. 8. as appears 20 Eliz. Dyer (e) 363. for the words of that act are, "for lack of any warrant of attorney of the party against whom the issue shall be tried:" so that when the verdict passes for the plaintiff, the lack of warrant of attorney for the plaintiff is not aided by that statute, nor *e contra*, but it is helped by the statute of (f) 18 Eliz. for there the words are general, "for want of any warrant of attorney," so that these words extend as well to lack of warrant of attorney of the party for whom as against whom the verdict passes.

(1) Vid. note (a) *Bishop's case*, Vol. III. p. 77.

Cases in the Court of Wards. [163 b.]

MYGHT'S CASE,

Trin. 7 Jacobi 1.

M. purchased to himself, and an infant, and their heirs, lands held of the Queen by knight's service. Held, 1. This purchase cannot be averred to be by collusion to take away the wardship which might accrue after the death of M. 2. No feoffment which M. can make of his moiety can be averred to be by collusion to take away the wardship or primer seisin due by his death. 3. When a father makes a feoffment for the advancement of his children or payment of his debts, such conveyance is good as to two parts, but void for the third.

In Curia Wardorum hoc termino, It was resolved by the two Chief Justices, and the Chief Baron, and by the Court of Wards (A), that where Jeffery Myght with his own proper money purchased twelve acres of land, late Lumner's, to him and Simond Mond, an infant, to them and their heirs, held of Queen Eliz. by knight's service; that this original purchase could not be averred to be by collusion, to take away the wardship which might accrue after the death of Jeffery Myght, because the said Jeffery was never sole tenant to the King; nor by the death of Jeffery in respect of the survivor, by force of jointenancy, any wardship or primer seisin could accrue to the King. 2. It was resolved, that no feoffment which Jeffery could make of his moiety could be averred to be by collusion, to take away the wardship or primer seisin due by his death; for, if no feoffment was made, no benefit could accrue to the Queen by his death. Also he is out of the statute of (a) 32 & 34 H. 8. for the statute of 34 H. 8. which is a statute of (b) explanation, speaks only of a (c) sole seisin in fee; for the words are, "having a sole estate or interest in fee simple, &c." 3. It was resolved, that when the father makes a feoffment for the advancement of his wife, preferment of his

Godb. 293.
6 Co. 76 a.
Co. Lit. 78 a.
76 a. b.
2 Roll. Rep. 303.

(a) 32 H. 8. c. 1.
34 H. 8. c. 5.
(b) 3 Co. 31 a.
Cr. Car. 34.
(c) Cr. Car. 33,
34.

(A) Court of Wards abolished by stat. 12 Car. 2. c. 24.; which statute, by abolishing the feudal tenures, has made the power of disposing of freehold lands of inheritance by will, general and unconfined.

[* 164 a.]

Touch. 68.

Co. Lit. 78 a.

10 Co. 83 a.

2 Inst. 110.

children, or payment of *his debts, that *that* cannot be averred to be upon covin or collusion, to give cause to the Queen to seise all the land; for the statute of 32 H. 8. gives power to the tenant to dispose two parts to such uses; and the statute of 34 H. 8. explains, that if all be disposed, it shall be good for two parts; and so upon the consideration of both the statutes, no averment can be of any covin in such cases, for the clause of 34 H. 8. concerning covin is: "If any person, &c. having estate of inheritance, of or in any lands, &c. holden of the King by knight's-service in chief, or otherwise of the King by knight's-service, hereafter shall give, will, devise, or assign, by will, or other act executed in his life, his manors, &c. by fraud or covin to any person for years, life or lives, with one remainder over in fee, or with divers remainders over for term of years, life, or in tail, with a remainder over in fee-simple, &c. or shall convey or make by fraud or covin, contrary to the true meaning of this act, any estates, conditions, mesnalties, tenures or conveyances, to the intent to defraud or deceive the King of his prerogative, primer seisin, &c. which should or ought to accrue or grow, &c. by or after the decease of his or their tenant by force, and according to the former statute, and of this present act and declaration, and the same estates, and other conveyances, being found by office to be so made and contrived by covin, fraud, and deceit, as is abovesaid, contrary to the true meaning of the said former act, and of this act, that then the King shall have as well the wardship of the body, and custody of the lands, &c. as livery, primer seisin, &c. which should or ought to appertain to the King, according to the true intent and meaning of the said former act, and of this present act, as though no such estates or conveyances by covin had never been had or made." So that this branch oftentimes refers this clause of covin to be contrary to the true intent and meaning of the former act, and of this act: and therefore it is first to be known, what is the true intent and meaning of the act of 32 H. 8. And that appears by the words thereof, *scil.* "That all and singular person and persons having, &c. shall have full power and authority to give, dispose, will, or assign, by his last will in writing, or otherwise, by any act or acts lawfully executed, two parts, &c. to or for the advancement of his wife, preferment of his children, and payment of his debts, or otherwise, at his will and pleasure." And the words of the statute of 34 H. 8. "shall have full and free liberty, power, and authority to give, dispose, will, or assign to any person or persons, &c. two parts, &c." Upon which acts being considered together in all their parts, it was resolved by the two Chief Justices, and the Chief Baron, and the court of Wards, that in all cases when the King's tenant conveys his land for *life, years, or in tail to his children, or when a stranger was joined with the heir in estate, or when a remainder was limited in fee, or when an estate was declared by will (all which cases were out of the statute of Marlbridge, and in which cases no collusion could have been averred, as appears

[* 164 b.]

by Sir George Curson's case, in the Sixth Part of my Reports, and by our books there cited) that in all such cases, now by the express letter of the clause of 34 H. 8. concerning covin and collusion, covin may be averred for the King but only for a third part, and not for the two parts, for both the acts have enabled the King's tenants to dispose of two parts at their wills and pleasures, as appears by the express letter of both the acts; and therefore where no covin could have been alleged for the King in the cases aforesaid, before this act, now covin may be alleged for the third part only, and thereof the act of 32 H. 8. puts example, *scil.* that he may convey two parts for the advancement of his wife, preferment of his children, and payment of his debts (against which no collusion could be averred at the common law) and concludes with general words, "or otherwise at his will and pleasure:" and it was objected, that in case where the King may take advantage of collusion apparent, or averrable within the statute of Marlbridge, c. 6. *de his qui primogenitos et hæredes infra ætatem existentes feoffare solent, &c. scil.* to advance only his son and heir of an estate in fee-simple, if such covin be found by office, the King shall take benefit thereof. To which it was answered and resolved, that by the express letter of 32 H. 8. which enables the tenant to convey two parts for the preferment of his children, the Queen shall have but the third part in such case, for the said branch of 32 H. 8. concludes, "any law, statute, custom, or other thing to the contrary notwithstanding." And so the statute gives in many cases remedy to the King, where he had not any before; and in some case more benefit to the subject than he had before. And the case of Myght as to this point was such, that Jeffery Myght being seised of divers lands and tenements in the county of Norfolk, in fee, some of them held of Queen Elizabeth *in capite*, made feoffments of divers parts of them to divers particular uses, to his brother and others of his blood, to some of them for life, and to some for years, the remainder to Thomas Myght his son and heir apparent in tail, the remainder to Jeffery his younger son in tail, the remainder to Anne his daughter in tail, the remainder to Edward Money in tail, the remainder to Jeffery his son in tail, with several remainders over in tail, the remainder to Thomas Myght in fee. And it was found by office after the death of Jeffery, that all the said estates and feoffments were made by fraud and covin, to deceive *and defraud the late Queen of her prerogative, ward, and marriage, and that Thomas was within the age of twenty-one years, and afterwards accomplished his age of twenty-one years, and before livery Thomas the son died without issue; after whose death another office was found, *anno tertio Jacobi*, with all the special matter, and Queen Elizabeth granted the ward and marriage of Thomas the Son, to R. Chamberlain, &c. and that Thomas the son, after his full age, died without issue of his body, before any livery prosecuted, and that Jeffery the son is his brother and heir, and within age, and also next heir to the

6 Co. 76 a.
Co. Lit. 78 a.

Co. Lit. 78 a.

2 Co. 94 a.
2 Inst. 109, 110.

[* 165 a.]

Co. Lit. 78 a.
2 Co. 93 b.
10 Co. 80 b.
Dyer 378. pl. 74.

Dyer 276. pl. 50.

said Jeffery the father. And it was resolved by the Court of Wards, in the time of Queen Elizabeth, that although the covin was found by office, that yet the Queen should have but a third part of the profits, and not the whole, for the causes and reasons aforesaid, and accordingly the Queen had but the third part of the profits, which concurs with the resolution before. It was also resolved by the Justices, that after the death of Thomas without issue, Jeffery should not be in ward, for the covin could not extend to Jeffery as heir to Jeffery the father, for at the time of the feoffment he was the youngest son, and the remainder was limited to him to take effect after the death of Thomas the eldest son without issue, and the Queen had once taken advantage of the statute after the death of Jeffery, and after the death of Thomas the son, he could not be in ward; for Jeffery the son claimed by force of a remainder, and Thomas had nothing but in tail, and he is dead without issue. And it was also resolved by the said Justices, that if the King's tenant leave a third part to the King, that no covin or collusion can be averred for the two parts, for the letter and intent of both the acts was, that the King should be satisfied with the third part; and therewith agrees Dyer, 10 Eliz. in the Lord Dacre's case, where it is said that this is the very meaning of both statutes joined together.

[165 b.]

DIGBY'S CASE,

Mich. 8 Jacobi 1.

The King shall never have wardship or primer seisin, but where there is an heir general or special.

(a) Baker's
Chron. 433.
Wilson's Hist.
29.

SIR Everard Digby seised in fee of the manor of Stoke in the county of Rutland, and of the manor of Tilton in the county of Leicester, held (by way of admittance) of the King by knight's-service *in capite*, by act executed in his lifetime, and before any treason by him committed, conveyed the said manors to the use of himself for life, and afterwards to the use of his eldest son and heir apparent in tail, with divers remainders over to his other issues; and afterwards the said Sir Ev. Digby was attainted and executed for the heinous and horrible (a) powder treason, committed after the said conveyance, his eldest son being then within age. The question was, whether the wardship of the body, or of the third part of the said manors, should be to the King, by force of the

statutes of 32 & 34 H. 8. And it was resolved by the two Chief Justices, the Chief Baron, and the whole Court of Wards, that the King shall never have (a) wardship or primer seisin, but where there is an heir general or special (A). For the said statutes of (b) 32 & 34 H. 8. give wardship or primer seisin to the King in divers cases where there is no descent; as if the King's tenant conveys his land for the advancement of his wife, preferment of his children, or payment of his debts; but doth not give wardship or primer seisin in any case where there is not any heir general or special; because wardship or primer seisin ought to be of the land of some ancestor who has an heir. And the words of the writ of *Diem clausit extremum*, or *Mandamus*, as well after as before the said statutes are, *Et quis propinquior hæres ejus sit*. Also livery ought to be sued in the name of the heir: but it was agreed, that in some case the King shall have wardship, or primer seisin of the son, although the father be attainted of treason; and thereby the blood corrupt. And therefore, if (c) tenant in tail of the King's gift, to hold by knight's-service *in capite*, had been attainted of treason before the stat. of (d) 26 H. 8. and died, his son within age, in that case, although the blood is corrupt, yet, because by force of the statute *De donis conditionalibus*, the land notwithstanding such attainder descends to the son (B), he shall be in ward to the King, because he is a special heir in such case, and that is proved by the book of 7 H. 4. 32 a. b. where the case was, King R. 2. by his letters patent granted divers manors, &c. to Thomas Holland Earl of Kent, to have and to hold to him and the heirs of his body; and afterwards the Earl, 1 H. 4. made an insurrection, and levied war against the King, and, committing the said treason, was killed without judgment, his son Edward, within age; after whose death the said Thomas Earl of Kent was attainted by Parliament of high treason: and farther it was ordained, that all his lands in fee simple, and no other, should be forfeited; by reason of which act of Parliament the King seised the said manors, and they were in the King's hands during the nonage of Edward the son, and afterwards the said Edward, at his full age, sued out of the Chancery a writ of *Mandamus*, by which the said gift and tenure, and that the said Edward was heir *per formam doni* was found; and thereupon the said Edward came into the Chancery, and prayed to have livery: and there it was resolved by Norton, Tremain, Hulls, Hankford, and Thirning, that in such case the son shall be in ward, and although the King seised as for forfeiture of treason, yet when the King is in possession, the law will adjudge him in by reason of wardship, because this is his best right; for the law more respects a small estate during the minority of the issue by right, than a great estate in fee-simple by wrong. But there Markham held, that when the King seises any land by forfeiture of trea-

(a) 10 Co. 84, 85 a.

(b) 32 H. 8. c. 1, 34 H. 8. c. 5. Co. Lit. 78 a.

Co. Lit. fol. 78 a.

10 Co. 85 a.
F. N. B. 251,
252 k. 353 b.
Dy. 155. pl. 22.
[* 166 a.]

(c) 2 Roll. 38.

(d) Co. Lit. 392
b. 3 Inst. 19.
4 Inst. 42.
1 Co. 22 a.
7 Co. 33 a. 34 b.
9 Co. 140 a.
12 Co. 6.
3 Co. 10 b.
26 H. 8. c. 13.
1 Leon. 21.
1 Roll. Rep. 162.
2 Roll. Rep. 314,
315, 318, 319,
320, 321, 323,
324, 325, 340,
374, 416, 418,
420, 501, 503,
507, 508.
1 Jones 70, 71,
75, 76, 77, 80.
Cr. Car. 428.
2 And. 34.
Palm. 439.
Hett. 151, 157.
Godb. 300, 303,
307, 308, 309,
311, 313, 315,
321, 322, 323,
324.
Co. Lit. 372 b.
Plowd. 552 b.
Hob. 334, 339,
340, 341, 343,
344, 346, 347,
348.
Dyer 332. pl. 27.
343. pl. 46.
Co. Ent. 422 a.

(A) The feudal tenures, together with their oppressive consequences, abolished by stat. 12 Car. 2. c. 24.

(n) Vid. note (z) *Dowtie's case*, 3 Co. 10 b. Vol. II. p. 27.

son, or other cause claiming fee, although one who claims a right in the land comes into the Chancery, and prays a *Mandamus*, those of the Chancery shall not grant it: and Gascoign said, that all the matter in this case is, if the writ of *Mandamus* issued well out of the Chancery or not; and all this appears by the said book. And it was agreed, that if there be (a) grandfather, father, and son, and the grandfather is tenant in tail, and the father is attainted of high treason, and dies, and afterwards the grandfather dies seised, although the blood be corrupt, yet the land shall descend to the son *per formam doni*, and this descent shall toll an entry, for the son is in by descent.

(a) 3 Co. 10 b.
Godb. 315, 316.
2 Roll. Rep. 321,
325, 418, 428,
496, 504, 508.
2 And. 34.
Hob. 343.
Cro. El. 28.
1 Jones 82.
1 Sid. 199.

[166 b.] THE EARL OF CUMBERLAND'S CASE,

Mich. 7 Jacobi 1.

King E. 2., by letters patent, granted the castle and manor of S. &c. to R. C. in tail. King H. 6. granted to T. C. the reversion of the said castle and manor of S. &c. with the appurtenances, and also the manor and castle aforesaid. Held, admitting the grant to R. C. was void, the castle and manor passed by the later grant to T. C. in fee simple, in possession.

See Skinner
655.
Lane 39, 40, 41.

In the great case of the Earl of Cumberland, heard in the Court of Wards this term, before the Earl of Salisbury, Master of the Wards and Liveries, with the assistance of the two Chief Justices and Chief Baron, for the castle and manor of Skipton in Craven, &c. in the county of York: it was held by the two Chief Justices and Chief Baron, that where King E. 2. by his letters patent had granted the said castle and manor of Skipton in Craven, &c. to Robert de Clifford in tail, King H. 6. *concessit* (as it was found by office) *Tho. Domino Clifford* (cousin and heir of the body of the said Robert de Clifford) *reversion' præd' castri et manerit de Skipton in Craven, &c. cum suis pertinen' necnon castrum & manerium præd'*, that admitting that the said grant in tail to the said Robert de Clifford was void (which was only put by way of admittance, without prejudice to any of the parties,) that yet the said castle and manor did pass by the later grant to Thomas Lord Clifford in fee-simple in possession. For the intent of King H. 6. was, that he it in possession or reversion, it should pass, and his words agree with his intent; for first, he

Lane 39, 40.

grants the reversion, if the first estate-tail was good; and if the estate-tail was not good, then he farther grants the said manor in possession, and so his words in his letters patent agree with his intention, and both agree with the law. As many leases made by the King and other his progenitors before him, to one to begin after the determination of such a lease, if the lease be good, and if the lease be not good, from such a feast, and such leases are good. Note reader, as to the recital of an estate-tail, or lease for life or years, by these words, *mentionatur fore concedi, or dimitti, &c.* it was but of late, (and yet of good) invention, but the ancient form was to recite the first grant, and to grant the reversion, and farther to grant the lands in possession, and these several grants in (a) a patent are as good and strong in law as if the King by a patent had recited the estate-tail, and granted the reversion, and by another patent had granted the land in possession; without question the one or the other will be good; so is it when the several grants are contained in one and the same patent; for (b) *frustra fit per plura. quod fieri potest per pauciora*. And the opinion of (c) Hussey, C. J. in 9 H. 7. 2 a. b. is good law, if it be well understood; for *non in legendo, sed in intelligendo leges consistunt*. For where he saith, it is clear, if the King intending to ratify and confirm a grant made by his predecessor of a franchise by his letters patent, and he ratifies and confirms the estate, and further adds this clause, *damus et concedimus*; this is but a void grant, which ought to be thus intended, that for fear of a forfeiture of the franchise, the patentee took a confirmation of the successor King, which is sufficient (before office found of the forfeiture) to discharge the patentee of any forfeiture; and therefore he well said, that the subsequent words, *damus et concedimus*, are but void, for the King in such case has not any estate grantable in law before office found, and therefore of necessity it ought to take effect by way of confirmation, and cannot enure by way of grant, and all this appears by Hussey's reason expressed in the said book, why *damus et concedimus* in such case are void: for (as he saith) (if) it shall not pass by this confirmation and by grant, then it shall enure by way of confirmation, and not by way of grant. *Vide* 11 E. 4. 1 b. 7 H. 7. 14 a. b. Plow. Com. 397. But in the case at bar, there is not any confirmation which presupposes that the King has but a title or right not grantable; but both estates as well of the reversion as of the possession are grantable estates, and so not like the said case put by Hussey. And when the King's charter may be taken to (d) two intents, and both intents are of effect and good, in many cases it shall be taken to such intent which is most beneficial for the King; but if it may be taken to one (e) intent of effect and good, and to another intent void and of none effect, it shall be taken and construed according to such intent, that the King's grant shall take effect, and which in judgment of law stands with the King's intent, for it was not the King's intent to make a void grant; and therewith

[*167 a.]

(a) Cart. 140.
5 Mod. 305.
2 Salk. 560.
1 L. Raym. 296.
Skin. 661.

(b) 9 Co. 95 b.
Co. Lit. 362 b.
3 Bulstr. 170.
Noy. 164.
1 Roll. Rep. 85.
Hard. 113.
(c) Plowd. 397 b.

Vin. Ab. Prerog.
F c 2. pl. 2.

(d) 1 Co. 45 a.
8 Co. 56 a.
10 Co. 67 b.
11 Co. 11 a. b.
Bulstr. 6. Kelw.
175 a. 198 a.
2 Sid. 141.
3 Leon. 243.
2 Roll. 200.
2 R. 3. 4 a. b.
(e) Antea 56 a.
6 Co. 56 a.
11 Co. 11 a. b.

(a) 1 Co. 45 a. agrees the book in (a) 21 E. 4. 44. in the Abbot of Wal-
 [*167 b.] tham's case: the reason and rule of which *book over-rule the
 2 R. 3, 4. case now in question: *scil.* either to make the grant good,
 8 Co. 56 a. either of the reversion, if the former grant in tail was good,
 11 Co. 11 b. or of the possession, if the former grant was void, or if no
 3 Keb. 234. grant was made *omnino*; but not to make the King's grant
 Dyer 269. pl. 19. utterly void, as well of the reversion as of the possession,
 Br. Patent 71, when the King has either the reversion or the possession in
 90. him. So it was held, if the King grants *totum illud manerium*
 Br. Exempt. 9. *sive firmam de D.* or *totam illam rectoriam sive advocacionem de*
 Br. Expos. 28. *D.* that if the King has a manor, or a farm and no manor, or
 Plowd. 32 a. a rectory impropriate, or an advowson and no rectory, that
 126 a. 143 b. which the King has shall pass; for the effect of the grant is,
 331 b. be it a manor or farm, rectory impropriate or advowson, that
 Fitz. Grant 29. which the King in truth has shall pass (A).
 Moor 165.
 Hard. 500.
 2 Roll. Rep. 275.
 2 Sid. 82.

(A) Upon the subject of grants by the King, *vid.* note (R 2) *et seq.* *Alton Wood's case*,
 1 Co. 41 a. Vol. I. p. 101.

[168 a.]

PARIS STOUGHTER'S CASE,

Hil. 7 Jacobi 1.

Which began Mich. 7. of the same King.

A *Melius inquirendum* reciting a former office, "that P. S. was seised of
 "a certain manor, and died seised the 22d February, 40 Eliz. &c. and
 "that the said manor was held at the time of the death of P. S. of
 "Q. Eliz. in socage, &c." was awarded, 7 Jac. to enquire whether the
 said manor at the time of the death of the said P. S. was held of the
 King by knight's-service. By virtue of the writ it was found that
 the said manor was held at the time of the death of the said P. S. of
 the late Q. Eliz. by knight's-service. Held, the writ of *Melius inqui-*
rendum is repugnant, and gave no authority to find such office as was
 found.

A *Melius inquirendum* shall be awarded on a surmise in Court that the
 lands are of greater yearly value than is declared in the office. So on
 a surmise that they are held by other services, or that the party is
 seised of another estate than is found in the office. But if in these
 cases, on the writ of *Melius inquirendum*, it be again found against
 the King, the King shall not have a new writ of *Melius inquirendum*.
 After office found against the King, the Court shall not in sound dis-
 cretion award a *Melius inquirendum*, unless on some matter of record,
 or some other pregnant matter to shew the former to be mistaken.

PARIS STOUGHTER was seised of the manor of Over-Stoughter Ley 34. in the county of Gloucester, to him and the heirs males of his body, and had issue Chambers Stoughter, and died: by writ of *Mandamus*, anno 2 Jac. it was found, that the said Paris was seised of the said manor, as is aforesaid, and died seised the 22d of Feb. anno 40 Eliz. and that Chambers was his son and heir; and that the said manor was held at the time of the death of the said Paris of Queen Eliz. as of her manor of Nether-hall in the said county, by fealty and rent, in free and common socage, &c. Trin. 7 Jacobi a *Melius inquirendum* was awarded (A), reciting the former office to enquire only of this point, whether the said manor of Over-Stoughter at the time of the death of the said Paris was held of our sovereign lord the King in capite by knight's service, or otherwise by knight's service. By virtue of which writ it was found, that the said manor was held, at the time of the death of the said Paris, of the late Queen Elizabeth by knight's service, as of her manor of Nether-Stoughter, and that at the time of the taking of the same inquisition, the said manor of Over-Stoughter was held of the King which now is, by knight's service, as of his said manor of Nether-hall. And it was clearly resolved by the two Chief Justices and the Chief Baron, that the said writ of *Melius inquirendum* was repugnant in itself, and gave not *authority to find such office as was found. For the said Paris died 40 Eliz. and the writ of *Melius inquirendum* was to enquire whether at the time of the death of the said Paris the said manor of O. was held of our lord the King which now is, which was impossible and repugnant, that in anno 40 El. the said manor of O. should be held of our lord the King, who then was King only of Scotland, and not of England. And although the finding was well, yet forasmuch as it was without the warrant of the writ, all was insufficient and void, and a new writ of *Melius inquirendum* ought to be awarded. Vide F. N. B. 255 D. that a *Melius inquirendum* shall be awarded on a surmise in Court that the lands are of greater (a) yearly value than is declared in the office, and by the like reason on a surmise that they are held by other services; or that he is seised of another estate than is recited in the office. But it was resolved, that if on the writ of *Melius inquirendum* in these cases it be again found against the King, the King shall not have a new writ of *Melius inquirendum*, and that for three reasons: 1. Because then there would be no end thereof; but such writs would issue infinitely, & + infinitum in jure reprobatur. 2. As if a writ of *Diem clausit extremum*, or *Mandam-*
seised of another estate than is found in the office. But if in these cases on the writ of *Melius inquirendum* it be again found against the King, the King shall not have a new writ.

A *Melius inquirendum* shall be awarded on a surmise in Court that the lands are of greater yearly value than is declared in the office: so on a surmise that they are held by other services; or that the party is

(a) Dyer 155. pl. 22. F.N.B. 255 b.d. 13 Co. 92. + 6 Co. 45 a. 7 Co. 44 b. 12 Co. 24. 2 Inst. 340. 2 Bulst. 99. Hob. 159.

(A) "A *Melius inquirendum* is grantable only on the part of the Crown: but, when there is any misbehaviour in the execution of an inquisition, it must be examined into; and if the Court see cause, they may quash it, and direct a new commission. But a *Me-*

lius inquirendum is for the Crown, who cannot traverse as the subject can," per Lord Hardwicke, *ex parte Roberts*, 3 Atk. 6. In what cases a *Melius inquirendum* is grantable, and in what manner, vid. Vin. Ab. *Melius Inquir.* A.B.C.

(a) Co.Lit. 77 b.
Dy. 292. pl. 71.

After office found against the King, the Court shall not in sound discretion award a *Melius inquirendum*, unless on some matter of record, or some other pregnant matter to shew the former to be mistaken.

(b) Ley. 28.
2 Inst. 206, 689.

[* 169 a.]

28 H. 6. 9 b.
Stand.Præf. 81,
82.

(c) Br. Scire
facias 9.

Br. Resciser 1.
(d) Br. Scire
facias 135.

Stan.Præf. 82 b.
(e) 2 Inst. 206,
573.

Plowd. 486 a.
Br. Office, &c.
55.

mus, &c. is found against the King, there shall not be a new writ of *Diem clausit extremum*; or *Mandamus* awarded; so if upon the *Melius* it be found against the King, no *Melius* shall be farther awarded. . *Vide* 12 Eliz. Dyer (a) 292, the *Melius* is in the nature of the first writ of *Diem clausit extremum*. 3. If office be found for the King, the party grieved may traverse it; and if the traverse be found against him, it makes an end of the business. So if it be found for him who tenders the traverse, it shall bind the King as to this matter. And so when the first office is found against the King, and the *Melius inquirendum*; also, the King thereby is bound from having another *Melius inquirendum* for the same matter; for the comparative degree is above the positive, and the superlative above the comparative, and not comparative upon comparative, no more than superlative upon superlative. But if upon the *Melius inquirendum* it be found for the King, yet the party grieved may traverse it: and it stands with reason, that when office is found for the King, that forasmuch as the party grieved is not concluded by it, but may traverse it; so when it is found against the King, forasmuch as the King cannot traverse it, that he should have a writ of *Melius inquirendum*; and yet the Register has not any writ in such case. Note, reader, it appears by the statute of (b) Lincoln, made 29 E. 1. that at the common law the escheators used to seise the lands of the King's tenants before office; and therefore it is *enacted by the statute, that when inquisitions are found by writ before escheators, *quod nihil tenetur de ipso dom' Rege, etc. quod statim absque dilacione mandetur per breve dom' Reg' de Cancell' præcipiend' quod Escheatores de terris & tenementis sic in manus dom' Regis per ipsos capt' manus suas amoveant omnino, &c. salvo semper domino Regi quod si postea Escheatores suas manus amoverint per breve ipsius domini Regis, ut præd' est, aliquid contigerit inventiri in Cancellaria vel ad Scaccarium, vel alibi in cur' ipsius dom' Regis per quod custodia terrarum aut tenementorum eorundem, de quibus Escheatores manus suas amoverint in forma præd' dom' Regi pertineat, quod statim præmuniatur ille per breve de Cancellaria, &c.* And this act doth not make against the said resolutions, for two reasons. 1. It is a rule in law, and affirmed by this act, that where the King's hands are once removed by matter of record, there for any title ancients than the amover, the King shall not reseise upon any new office found without a *Scire facias*; and that appears in (c) 28 H. 6. 9 b. (d) 9 Ed. 4. 51 b. *Vide* 5 H. 5. 2 a. But in the case at bar there was never any seisure into the King's hands, and by consequence there could be no *Amoveas manus*, and therefore this case is clearly out of that statute. At this day the Escheator (e) before office found, cannot seise any lands into the King's hands; but the seisure ought to be after office found; and that appears by the statute of W. 1. cap. 24. *Vide* 5 Ed. 6. Br. Office 55. and many other books, and so is the common experience at this day; and therefore the case at bar is out of the said statute. And true it is, that after a *Diem clausit extremum*, or *Mandamus*, &c.

awarded and found against the King, no new writ of *Diem clausit extremum*, or *Mandamus*, shall issue, as it is held in (a) 4 Hen. 7. 15 b. & 16 a. 14 Ed. 4. 5 a. 15 Ed. 4. 11. 8 El. Dyer (b) 248 & 249. But in such case a writ of *Melius inquirendum* shall issue, as is aforesaid, and as the common course in the Court of Wards is, and always has been: and with this difference all the books are well reconciled, and agreed; & *sic interpretare & concordare leges legibus est optimus interpretandi modus*. But in good discretion no *Melius inquirendum* shall be awarded after office found against the King, without sight of some record, or other pregnant matter for the King, for avoiding of vexation of the subject (b). *Vide* 12 Eliz. Dyer (c) 292. It is found by office, on a *Diem clausit extremum*, that the land was held *de domina Regina, sed per quæ servitia juratores ignorant*, whereupon a *Melius inquirendum* was awarded, by which the tenure was found of a subject, and all other points certainly found, by that the first office is void in all *per sensum statuti de 2 Edw. 6. (d) cap. 8.* And all these resolutions were affirmed for good law. *Mich: 8 Jac.* *by the said Chief Justices and Chief Baron in Stephen (e) Garner's case in *Curia Wardorum*, for lands in Furseby and Steeping in the county of Lincoln, as to the said writs of *Melius inquirendum*, where it was found by the first office, that the lands were held of Eustace Hart, Esq. and his wife, as in the right of his wife of their manor of Steeping: and upon the *Melius* it was found that the said lands were held of Sir Edw. Carre, Knight, as of his manor of Monkthorp; and notwithstanding this variance of the offices, yet it was resolved *ut supra*, that no new writ of *Melius* should issue, for the reasons and causes before alleged.

(a) Br. Office, &c. 33.
(b) 2 Inst. 572. Dyer 248, 249. pl. 81, 82.

(c) Hob. 50. Dyer 292. pl. 71.
Co. Lit. 77 b.

(d) 2 Inst. 688, 689.
[* 169 b.]
(e) Ley. 27, 28.

(n) In *Knight ex parte Duplessis*, 2 Ves. 555, Lord Chancellor Hardwicke observes "the rule is, that in sound discretion the Court should not award a *Melius inquirendum*, unless on some matter of record,

or some other pregnant matter, to shew the former commission to be mistaken;" and that Stoutter's case was determined by great men, and that upon grounds of equity as well as law.

[170 a.]

TOURSON'S CASE,

Pasch. 8 Jacobi 1.

An inquisition finding a person an idiot *à nativitate*, entitles the King to the profits of the idiot's land, from the time of finding the office; but shall have relation back to the time of his birth, for avoiding all mesne acts done by him.

(a) 4 Co. 126 b.
Co. Lit. 247 a.
Stan. Præc. 33 b.
34, 35.
2 Inst. 14.
† Vin. Ab. Lun.
B 2.
Bac. Ab. Idiot
and Lun. F.
Co. Lit. 390 b.
391.
Postea 171 b.

WILLIAM TOURSON, an idiot, *à nativitate*, by force of a remainder after the death of his father, was jointly seised with his elder brother for term of their lives; the lessor purchased the estate of the elder brother, and took the body of the idiot, and all the profits of the land, and afterwards William Tourson was found an idiot *à nativitate* by inquisition: the question was, whether the King should have the mesne profits of the moiety from the time of the first seisin of the idiot, or from the time of the office; and it was resolved, that the King should not have the profits, but after the office; and yet to some intent the office shall have relation from the time of the birth, *scil.* to avoid all mesne acts done by the idiot; and therewith agree F. N. B. 202 e. and (a) 18 E. 3. *Scire facias* 10. 32 E. 3. *Scire facias* 106. 50 Ass. pl. 2, &c. *Vide* Beverley's case, in the Fourth Part of my Reports 124, 125. But for the mesne profits, it shall not have relation but from the time of the office found; † for thereby it appears of record, that the King has right to seise the lands; as if the King's tenant commits felony, *anno 1 Jac.* and afterwards *anno 3* he is attainted for the same felony, and afterwards *anno 4* all is found by office: now this office shall have relation to the time of the felony, to avoid all mesne alienations and incumbrances; but for the mesne profits, it shall have relation to the time of the attainder, for then the King's title appeared of record; and therewith agree Plow. Com. 488. and 38 Ed. 3. 31, 32. by Kirton. *Vide* 29 H. 8. Br. Chart' de Pardon 52. and there is a difference when the King shall have the custody, by reason of a seignior, as in case of wardship, there the King after office found, shall have the mesne profits from the time of the death of the ancestor, for there the King has the custody, *by reason of his seignior, and he loses his rent and services in the mean time. But the King has the custody of an idiot, not in respect of any seignior, but *jure protectionis suæ regis*, because his subject is not able to govern himself, nor the lands or tenements which he has; and this protection begins by the office found. And the statute *De*

[* 170 b.]

1 And. 23.
Moor 4. Dy. 25,
26. pl. 164.

prærogativa Regis, cap. 9. saith, quod Rex habebit custodiam terrarum futurorum, capiendo exitus, &c. et inveniet eis necessaria sua, &c. by which it appears, that the King shall take the profits from the time that he is charged with the finding of the idiot and his family necessities, and that is after the office found; so that when the King seises *jure protectionis regie*, as in the case at bar, or *nomine districtionis*, as in case of alienation of land *in capite* without licence, or of marriage of his widow without licence, there, after office found, the King shall not have any mesne profits before the office, as it is held in 8 E. 4. 4. 40 Ass. pl. 36. But when the King seises *ratione prioris recti seu tituli*, by reason of a former right or title, there the King shall have the mesne profits from the time of his right or title first accrued, as 18 Ass. pl. 18. from the time of the condition broke, 41 Ed. 3. 21. from the time of the alienation of his tenant in mortmain; and if the lands are held of others, from the time of the title devolved to him, 46 E. 3. Forfeiture 18. upon the statute of Westminster 2. cap. 45. which gives the *contra formam collationis*, from the time of the alienation; for by those acts the King's title and right accrues: *vide* 35 E. 3. Vill. 22. 40 Ass. pl. 36. 9 E. 4. 5. And in the principal case no precedent can be found, that the King was answered the mesne profits before the office found, but only after the office, and so the *Quære* in Stamford's *Prærogativa Regis*, 34 b. is well resolved.

Stanf. Prm. 33b. 34, &c.

1 Leon. 4. pl. 50.
3 Leon. 175.
pl. 226.

Moor 293.

SIR GERRARD FLEETWOOD'S CASE, [171 a.]

Pasch. 8 Jac. 1.

A sale by a debtor to the King, of a lease for years is good; such lease shall not be extended in the hands of the purchaser for the King's debt.

A sale of chattels *bonâ fide* is good after judgment, but not after execution awarded.

*A felon or traitor may after the felony or treason, and before conviction, sell *bonâ fide* for his sustenance, &c. his chattels real or personal.*

SIR William Fleetwood, anno 35 Eliz. was possessed of a house and certain lands in Pinner in the parish of Harrow, in Harrow in the county of Middlesex, for certain years yet during, and anno 36 Eliz. he became Receiver General of the revenue of the Court of Wards, &c. and entered into twenty bonds, each of them 200*l.* with condition to make a yearly perfect account before the 20th of June, &c. and after-

If not *bona fide*,
it shall not bind
the King. 12
Co. 2, 3.

(a) Bi. Execut.
84. Br. Assise
318. Br. Extin-
guishment 61.
(b) Br. Assise
347.
(c) 2 Roll. 157.
(d) Cro. Ja. 451.
Cro. El. 174,
181, 440.
2 Roll. 157.
Cro. Car. 149.
1 Leon. 145,
304.
Kelw. 87 a.
29 Car. 2. c. 3.
Moor 352, 873.
[* 171 b.]
1 Roll. 893.
(e) Cr. Jac. 451,
452. 7 H. 6. 2.
Cr. Car. 149.
Kelw. 87 a.
29 Car. 2. c. 3.
(f) 3 Co. 12 b.
11 Co. 93 a.
Plowd. 321 a.
Godb. 292, 297.
2 Roll. Rep. 300, 302. Hard. 25, 26. Dyer 224, 225. pl. 32, 33. (g) 1 Roll. 346. 2 Roll. 156, 157.
Plowd. 261 a. 50 Ass. pl. 3. Fitz. Execut. 113. Br. Execution 148. Co. Lit. 185 a. (A) Co. Lit.
391 a. Plowd. 68 a. Antea 270 a.

wards upon several accounts in the years 36, 37, 38, and 39 Eliz. he became indebted to the Queen in great sums of money; and he being so indebted, by his indenture, 10 Feb. 40 Eliz. in consideration of 1100*l.* bargained and sold the said lease to James Pemberton, by force whereof he entered and was thereof possessed; which mesne conveyance, and in consideration of 1300*l.* was sold to Sir Gerrard Fleetwood. The question was, Whether the said message and lands are now extendible, or liable to the King's debt? And although it is at the election of the Sheriff, either to extend or to sell a lease, so long as it remains in the debtor's hands, as appears in the books of (a) 31 Ass. p. 6. 38 Ass. p. 4. 44 E. 3. 16. 7 H. 6. 2, &c. yet it was resolved, that the said sale of the term should bind the King, because the term was but a chattel, and there was no covin in the case, and a sale (c) *bona fide* of chattels is good after judgment, but not (d) after execution awarded (A), as appears in 2 H. 4. 14. *per cur'*, 9 H. 6. 58. 11 H. 4. 7. and of the freehold or inheritance, which he has at the time of the (e) judgment, in case of a common person, and from the time one becomes the King's debtor, 5 Eliz. Dyer 224, 225. Sir William (f) Cavendish's case. And the case in (g) 50 Ass. p. 4. was urged to the contrary, where the King's debtor took a lease to him and his wife for years, and before execution the husband died, execution was sued against the wife, for it was the act of the husband, and he had power of the term *at the time of his death, and the wife came to it without valuable consideration, and *quodammodo* continued in of the interest of her husband. And Coke, Chief Justice, said, that a receiver, or other accomptant who is indebted, shall not be in a worse case than a (h) felon or traitor, who may, after the felony or treason, and before conviction, sell *bona fide* for his sustenance, &c. his chattels, be they real or personal (B).

(a) Vid. note (a) *Lillingston's case*, ante, p. 129. And as to whether under the word *goods* in the stat. 29 Car. 2. c. 3. leaseholds are comprised, vid. *Burdon v. Kennedy*, 3 Atk. 739. *Sugden on Vendors*, 656 *et seq.* 6th edit.

(b) A person being in Newgate for robbery and burglary, and his goods being seized by the defendant, who was sheriff of London, made a bill of sale of all his goods to his son; on trover brought by the son against the defendant, it was held by Holt, C. J. that the bill was fraudulent, and that though a sale *bona fide* and for a valuable

consideration had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet that such a conveyance as this cannot be intended to any other purpose than to prevent a forfeiture and defraud the King; and this he said was a fraud at the common law. *Jones v. Ashurt*, Skin. 357. If such a conveyance is not a fraud at common law, yet it seems clearly to be a fraud within stat. 13 Eliz. c. 5. *Pauncefoot's case*, cited in *Twyne's case*, Vol. 11. p. 222. 4 Black. Comm. 388. Vid. Vin. Ab. Forfeiture P.

HALE'S CASE,

[172 a.]

Pasch. 8 Jacobi I.

The heir in ward to the Queen at his full age tendered his livery, and was admitted to it; and then bargained and sold his land to another in fee, and died within the usual time given for the prosecution of the livery. Held, the King's interest is determined by the tender, and the bargainee shall not answer for the mesne profits.

By office after the death of Sir James Hale, it is found that he died seised of divers lands in the county of Kent in fee simple, whereof part was held of Queen Eliz. by knight's service *in capite* (A), and that Cheyny Hale was his son and heir, and within the age of twenty-one years, and in ward to the Queen; and afterwards Cheyny Hale accomplished his full age, as appeared by the computation of the first office, and so he was in truth, and he tendered his livery, and was admitted to it, and within the usual time given him for the prosecution of the livery, by deed indented and inrolled, he bargained and sold part of his said lands to another in fee, and died also within the said time. And two questions were moved; 1. If the livery of the said Cheyny Hale be lost by his death? 2. Whether the issues and profits of the lands so aliened, after the tender of the livery and death, are to be answered to the King for want of livery, and for what time? And it was agreed, that at the common law, the King shall have primer seisin when the ancestor dies, his heir within age, and was in ward, and that the statute of *Prærogativa Regis*, cap. 3. is but an affirmance of the common law, *scil. Rex habebit primam seisinam, post mortem eorum qui de eo tenent in capite de omnibus terris de quibus, &c. cujuscunque ætatis hæredes fuerint, cap. exitus, &c. donec, &c. ceperit homagium hujusmodi hæredis*. For when he has been in ward, he upon his livery shall pay but half a year's profit; and when he is of full age, a whole year's profit; and that was the common law, for no such distinction is made by the said act. And it appears by the said act, that primer seisin is, that the King shall take the profits of the land, *donec ceperit homagium*, which is as much as *to say, until he has sued livery, for upon his livery he doth homage; so that the King's interest is subject to this *donec*,

1 Leon. 157.
Lit. Rep. 340.

Lit. Rep. 340.
Stamf. Præf.
11 b. 12, &c.

Co. Lit. 77 a.

[* 172 b.]

(A) Tenures by knight's service, &c. abolished, 12 Car. 2. c. 24.

(a) 6 MoIs Lit.
Rep. 340.

(b) 4 Co. 11 a.
5 Co. 22 a.
4 Co. 11 b. 68 a.
1 Co. 98 a.
9 Co. 131,
132 b.
Hard. 387.
1 Co. 98 a.
Co. Lit. 29 a.
(c) 9 Co. 132 a.
Co. Lit. 77 a.
9 Co. 132 a.

which is a limitation in law; then when the heir, at his full age, tenders his livery, which includes tendering of his homage, it is all that the heir can do; and therefore if no laches be afterwards in the heir in the prosecution of his livery, he shall have as much advantage by his tender, as if he had done homage, and had had his livery when he made his tender, and the convenient time which the law gives the heir to prosecute his livery out of the King's hands after tender, is three (a) months, because many things are requisite and necessary, with great care and diligence, to be well and duly pursued in the prosecution thereof, than when the heir dies within the said time: so that the doing of his homage, and suing out his livery without fault in him, is become impossible by the act of God, (b) *impotentia in hoc casu excusat legem*, and in judgment of law, (c) the King's interest by the said limitation is determined, as if the King had taken the homage of the heir when he made the tender. And with this resolution agree all the precedents of the court; and therefore when the heir tenders his livery, the Court of Wards, for fear of death, have used to take collateral assurance for that which is due to the King. But if the heir, after he comes of full age, or if he be of full age at the time of the death of his ancestor, dies without any tender; the livery is gone, as is aforesaid. But the King shall have all the mesne profits until the death, for default of tender; but the tender, if it be pursued, or if within the time it becomes impossible, by the act of God, *scil.* the death of the heir, there the King by law is barred from having the mesne profits, as is aforesaid. *Vide Stamford Prærog.* 12, 13, &c. And it was resolved, that in this case the King's interest, by the said limitation and act in law, was determined by the death of the heir, so that the bargainee might enter and occupy the land without any *Monstrans de droit*, or *Amoveas manum*, &c.

SIR HENRY CONSTABLE'S CASE, [173 a.]

Pasch. 8 Jacobi 1.

The son of one who held land of the King by knight's service *in capite* was knighted, the father died, the son within age tendered his livery, and continued it. Held, the mesne profits and rates of his nonage are saved.

SIR Henry Constable, Knight, 15 *Decembris*, anno 5 *Jac.* died seised of an estate in fee-simple of lands held of the King by knight's service *in capite* (A), Henry Constable his son and heir being within age, and made a knight in the life of his father, 1 *Julii*, anno 7 *Jac.* Henry the son accomplished his age of twenty-one years. Henry the son tendered his livery after the death of his father before his age of twenty-one years, and continued it: and the questions were, 1. Whether the profits of the land should be saved to him by the said tender and continuance? 2. Whether the King should have the rates within the age of twenty-one years? And both questions were clearly resolved against the King, and that the King should have primer seisin, as if he had been of twenty-one years at the time of the death of his father, because the King, being the sovereign of knighthood, has adjudged him of full age to (a) do knight's service in the life of his father, for the reasons reported at large in *Sir Drue Drurie's case*, in the Sixth Part of my Reports, fol. 73. All which were affirmed for good law by the Chief Justices, and Chief Baron.

6 Co. 73, &c.

(a) Lit. sect.
103. 6 Co. 73,
74 b. 75 b.
78 b. Cr. Jac.
156, 389. 3 Co.
34 b. Hob. 46,
91. 6 Co. 74 a.
Plowd. 268 a.

(A) Tenures by knight's service, &c. abolished, 12 Car. 2. c. 24.

[173 b.]

VIRGIL PARKER'S CASE,

Trin. 8 Jac. 1.

The King's tenant conveys half his land for the jointure of his wife, the other half for the payment of his debts. Held, the King's third shall be taken equally out of the whole.

(a) 10 Co. 84
a. b.

VIRGIL PARKER, (a) seised of the manor of Fushil in fee, held of the King by knight's service (A) as of his duchy of Lancaster, anno 27 Eliz. made a feoffment of one half of the said manor to John Coxwell, and others, before marriage, to the use of himself for life, and afterwards to the use of Mary Coney, whom he then intended to marry, for life, for her jointure, and afterwards to the use of himself in tail, with divers remainders over, and afterwards he married the said Mary; after which marriage, sc. 39 Eliz. the said Virgil leased the other half of the said manor to the said John Coxwell, and Edward Long, for divers years, for payment of his debts and legacies, and afterwards made his will, and thereby devised 1000*l.* in portions to his younger children, and died, his son and heir within age. And the question was, if the King should have the third part out of the half of the manor in lease only, or out of the wife's half and this half also? And it was resolved, that forasmuch as the advancement of his wife is as well within the statute, as (b) payment of his debts, and preferment of his children, and forasmuch as the operation of the statute principally takes its effect by the death of the King's tenant; for this reason, although the estate of the wife has the precedency, it was resolved, that the King's third part should be taken (c) equally out of both halves, and not out of the half so devised only. And so was it resolved in Mich. 41 & 42 Eliz. betwixt Remington and Savage, and 23 Eliz. in Thynne's case; and therewith agrees the common experience of the Court of Wards.

(d) Co. Lit. 76
b. 73 a.

(e) 10 Co. 84
a. b. 9 Co. 133
b. Moor 745,
746.

(A) The power of a disposition by will of freehold lands of inheritance is general, and not confined since the statute for the abolition of the feudal tenures.

END OF VOL. IV.

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